UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

AMY COHEN, et al., PLAINTIFFS, v. BROWN UNIVERSITY, CHRISTINA PAXSON, as successor to VARTAN GREGORIAN, and JACK HAYES, as successor to DAVID ROACH DEFENDANTS	EXPEDITED RELIEF REQUESTED Case Number: 92-CV-0197

PLAINTIFFS' MOTION TO ENFORCE JUDGMENT, TO ADJUDGE IN CONTEMPT, AND FOR EMERGENCY RELIEF

Plaintiffs, members of a certified class of women varsity athletes and potential athletes at Brown University, by their undersigned counsel, hereby move to enforce the Court's Judgment of October 15, 1998; adjudge Defendants in contempt of that Judgment; and for emergency relief, providing Plaintiffs with expedited discovery and prohibiting Defendants from eliminating any women's varsity intercollegiate athletics team until Defendants can prove that the elimination of the teams will not violate the Court's Judgment. In support of this motion, Plaintiffs state as follows:

1. On October 15, 1998, after notice to the class and hearing, the Court entered its Judgment in this case, approving and ordering the parties to comply with their Joint Agreement of June 23, 1998. (Judgment and Joint Agreement attached as Exhibit A).

2. The Joint Agreement constitutes the binding agreement of the parties on Brown's plan for compliance with Title IX of the Education Amendments, 20 U.S.C. §1681, as to its intercollegiate athletic program.

3. The Joint Agreement has been in operation since 1998. Every August, Brown has provided class counsel with reports of its program and participants for the academic year just

concluded. Over the past 20 years, Brown has failed to achieve compliance at the 3.5% level in 2000-2001 (3.7%), 2001-2202 (4.8%), 2004-2005 (4.4%) and 2009-2010 (5.6%). In those years, Brown notified Plaintiffs' class counsel of the noncompliance and took action to address and correct the issues leading to noncompliance.

4. Paragraph III.C.1. of the Joint Agreement provides, among other things, that, if Brown University eliminates any "intercollegiate athletic teams for women," then "the percentage of each gender participating in Brown's intercollegiate athletic program shall be within 2.25% of each gender's percentage in the undergraduate enrollment for the same academic year."[1]

5. On May 28, 2020, Defendants announced that, effective immediately for the 2020-21 academic year, Brown University was:

a. eliminating five women's intercollegiate athletic varsity teams -- women's equestrian, fencing, golf, skiing, and squash;

b. eliminating six men's intercollegiate athletic varsity teams -- men's fencing, golf, squash, indoor and outdoor track, field, and cross country; and

c. adding an intercollegiate varsity sailing program

6. Counsel for Brown also telephoned class counsel Labinger on this day and notified class counsel of these changes. Counsel for Brown did not reach out to class counsel prior to announcing its plans publicly or make any attempt to come to an agreement regarding the elimination of these women's teams.

[1] Paragraph III.A.1. of the Joint Agreement provides, among other things, that, if Brown does not eliminate any women's intercollegiate athletic team, then the percentage of each gender participating in its intercollegiate athletic program shall be within 3.50% of each gender's percentage enrollment for the same academic year. Until now, Brown has not tried to eliminate any women's intercollegiate athletic team since the Court approved the Joint Agreement and entered Judgment.

7. On June 6, 2020, Defendant Paxson publicly stated that the elimination of men's indoor and outdoor track and field and cross country was necessary for Brown to comply with the settlement agreement in the above-captioned matter. "Since the announcement of the athletics initiative, there have been requests to restore men's track, field and cross-country; however if these sports were restored at their current levels and no other changes were made, Brown would not be in compliance with our legal obligations under the settlement agreement."
(Available at https://www.brown.edu/about/administration/president/statements/addressing-brown-varsity-sports-decisions, accessed 6/23/20).

8. On June 9, 2020, President Paxson announced that Brown University was restoring men's track, field and cross-country, and no other changes were made. In a letter to the Brown Community, she wrote, "The reinstatement is effective immediately and does not alter other decisions to reduce the number of varsity sports as part of the initiative." (Available at https://www.brown.edu/news/2020-06-09/track, accessed 6/23/20).

9. Defendants' decision to eliminate five women's intercollegiate athletic varsity teams, and with them meaningful participation opportunities for women, constitutes a gross and willful violation of the Joint Agreement to the immediate and irreparable harm of the class.

10. On June 10, 2020, class counsel notified Defendants in writing that they were in gross violation of the Joint Agreement and commenced efforts to resolve the matter without Court intervention. (Attached as Exhibit G).

11. On June 10, 2020, Plaintiffs requested production of reports, resolutions, and analyses of the decision-making leading up to the determination to cut the five women's teams and that only by cutting men's track, field and cross-country would Brown comply with the Settlement Agreement. In its public postings, Brown had described a long and considered deliberative process,

comprised of proceedings and deliberations of consultants, a Presidential Committee on Excellence in Athletics, internal review within Athletics, and the Office of the President, culminating in review and approval by the Board of Trustees. A copy of the request is appended as Exhibit G.

12. Brown declined to provide any of the requested materials. In a conference call of counsel on June 12, 2020, Brown's counsel also stated it did not yet have its analysis to show compliance at the 2.25% level.

13. On June 16, 2020, Defendants provided class counsel with projected participation numbers for teams for the 2020-21 year on which it based its claim that it would be in compliance. In that projection, Brown claimed that there would be 25 women on the women's varsity sailing team and the same 25 women on a coed varsity sailing team, along with 10 men. Brown did not provide any projection of the undergraduate enrollment of women at Brown for 2020-21, contending such numbers are unavailable. In making its projections, Brown used estimated team sizes based on its projections for 2020-21, but used the 2019-20 rate of 52.3% women undergraduates, claiming it had no additional information. The Joint Agreement, however, requires women's athletic participation rate for 2020-21 to be within 2.25% of women's undergraduate enrollment rate "for the same academic year." Moreover, President Paxson, in her letter of June 6, 2020, stated that undergraduate enrollment for women is "currently at about 53%."

14. On June 18, 2020, class counsel also asked Defendants to provide them with all data, reports, analyses, and other information leading up to and forming the basis for the decision to reinstate the men's track, field, and cross country teams and make no other changes. Defendants have refused to provide all such information. Counsel also requested Brown's June or preseason team rosters for the last three academic years and any written plans that exist for the creation of

the coed and/or women's sailing teams. Brown has not provided this information. Plaintiffs also asked Brown when, if at all, it would make the sailing coach and the administrative person(s) who knows the most about the varsity sailing teams available for interviews. Brown has not responded to those requests.

15. Defendants have provided class counsel with intercollegiate athletic participation numbers for 2019–20 and previously provided the participation numbers for 2018–19. These numbers demonstrate why President Paxson made her June 6 announcement that "Brown would not be in compliance with our legal obligations under the settlement agreement" if men's track, field, and cross country teams were reinstated and Brown made no other changes. Based on the numbers provided by Brown, if the five women's teams were eliminated along with the six men's teams originally included (including track, field, and cross country), then women's opportunities would be (depending on the year) 42.15% or 42.72% of the total eliminated—bringing women *closer* to equality in Brown's program. But with men's track, field, and cross country reinstated and no other changes made, women's opportunities will be (depending on the year) 66.83% or 69.35% of the total eliminated—bringing women *farther* from equality in Brown's program.

16. This chart shows the numbers:

Teams Eliminated		Number of participants 2019-20	Number of participants 2018-19
Women's			
	Equestrian	23.5	21.5
	Fencing	12	13.5
	Golf	9	11
	Skiing	10	9
	Squash	14	14
Total		**68.5**	**69**
Men's			
	Fencing	11	8.5
	Golf	8	8.5
	Squash	15	13.5
(Reinstated)			
	Cross Country	15	17
	Track and Field	45	45
Total Eliminated Originally		**94**	**92.5**
Total Eliminated Now		**34**	**30.5**
Total Women's % Originally		**42.15%**	**42.72%**
Total Women's % Now		**66.83%**	**69.35%**

17. As a result, based upon the participants Brown has provided for 2019–2020, if the five women's teams were eliminated along with the six men's teams originally included (including track, field, and cross country), the participation rates for men and women in Brown's 2020–21 intercollegiate athletic program would likely have been within 2.25% of their undergraduate enrollment rate for 2019–20. (We do not yet know the undergraduate enrollment rates for 2020-21.) But, with the men's track, field, and cross-country teams reinstated, the participation rates for men and women rates in Brown's 2020–21 intercollegiate athletic program will be 4.4% from their undergraduate enrollment rate for 2019–20:

2019-2020 Total Undergraduates	
Men	3249
Women	3561
Percentage of Women	52.29%
Total Number of Athletes with All 11 Teams Eliminated	
Men	354
Women	380.5
Percentage of Women	51.80%
Total Number of Athletes after 3 Men's Teams Reinstated	
Men	414
Women	380.5
Percentage of Women	47.89%
Difference from Undergraduate Percentage Rates	
With All 11 Teams Eliminated	0.49%
After 3 Men's Teams Reinstated	4.40%

18. In response to these facts, Defendants now claim that their plan to add a varsity women's and coed sailing program will bring the participation rates in Brown's 2020-21 intercollegiate athletic program within the required 2.25% of the 2020-21 undergraduate enrollment rates. In support of this position, Defendants say that there will be 25 women on the women's team and the same 25 women on the coed team—and that, for purposes of measuring compliance, these 25 women should be counted twice.

19. No sailing program currently exists at the varsity level at Brown. Defendants cannot rely on estimated numbers of a non-existent varsity team to demonstrate compliance with the Joint Agreement or Title IX. If Defendants are permitted to demonstrate compliance based upon projections that do not come to fruition, then it will be too late to undo the harm to the student-athletes on the women's teams that Brown is trying to eliminate. Moreover, the Joint Agreement

expressly sets forth that all measurement is based on actual participants on varsity teams in existence on the first and last day of competition in the year concluded.

20. Class counsel have attempted to confer and work with Defendants to stop the harm that is resulting from Brown's decision to violate the Court's Judgment and the parties' Joint Agreement.

21. Defendants have declined to enter negotiations with Plaintiffs and confirmed their intention to move forward with the elimination of the five women's varsity teams.

22. As discussed in the accompanying memorandum, Plaintiff class members will suffer irreparable harm in the absence of interim relief. This Court has previously recognized the irreparable injury that athletes experience and the danger that women's teams at Brown will not survive elimination of varsity status. The Court has previously held that "club status" is not equivalent to "varsity status." The Court has previously found that elimination of varsity status adversely affects the athletes and the continued viability of the teams for the students and future class members in three major areas: recruitment, diminution of competitive level and access to varsity competition, and loss of coaching staff. In addition, athletes on club teams have no access to varsity facilities, which include the trainers, weight room, and medical support.

23. Upon information and belief, at least one of the women's teams' coaches, having been advised of impending termination by Defendants, has committed to employment at another academic institution.

24. The actions of the Defendants jeopardize the ability of current class members on these teams from participating in varsity athletics for the rest of their career at Brown, due to the short amount of time that an athlete can participate in varsity sports at the intercollegiate level.

25. Each of the affected women's teams presents genuine and viable opportunities to

participate in the Brown intercollegiate athletic program at the varsity level, which opportunities are being denied by Defendants' actions.

26. **Equestrian.** Women's Equestrian at Brown won the Regional Championship in 2017-18, in which twelve collegiate teams competed. The team finished as the top team in its region (of 12 schools) in 11 out of the past 20 seasons and has finished in the top five nationally five times. Brown's Equestrian team has made more appearances at the nationals than all of the other Ivy League teams combined.

a. Hannah Woolley, a member of the team and of the Brown class of 2021, placed second in two events at the 2018 Ivy Championships and qualified for post-season competition in 2019. Maya Taylor, a member of the team and of the Brown class of 2022, was recognized as the Academic All-Ivy recipient for 2018-19 and 2019-20 and was slated to be co-captain of the team for the next two years.

b. The team was standing in second place in the region when the 2019-20 season was terminated. There is no established club team for equestrian at Brown, and it is expected that the student "fees" or "dues" associated with a club equestrian team (there are none for a varsity) would pose a significant financial barrier for many to continue to participate even if offered.

27. **Fencing.** Women's Fencing at Brown had a team member who captured third place at the NCAA Northeast Regional in 2020 and qualified for the 2020 NCAA Championships, which were not held. The team has had four NCAA All-Americans since 2000.

a. Casey Chan, a member of the team and of the Brown class of 2023, is a nationally ranked fencer, who qualified for the COVID-cancelled post-season competition, but will never have a chance to compete at that level if she stays at Brown.

b. Anna Susini, a member of the team and of the Brown class of 2022, was slated to be captain of the team in 2020-21. In applying for colleges, she limited her selections only to those offering varsity-level fencing. In 2020, Susini collected "First Team Foil honors" at the Northeast Fencing Conference.

28. **Golf.** Women's Golf at Brown had just installed a new coach in 2019-20 and announced three new recruited freshmen on April 30, 2020. In the past eight years, the team has produced three Academic All-Ivy recipients, First and Second Team All-Ivy players, and won the Ivy League Championship in 2015.

a. Winnie McCabe, a member of the team and of the Brown class of 2021, was twice recognized as an All-American by the Women's Golf Coaches Association. As a senior finishing her college career, this is her last opportunity to participate in her chosen varsity sport.

b. Pinya Pipatjarasgit, a member of the team and of the Brown class of 2022, finished in fourth place at the Brown Bear Invitational in 2018. Outside of Brown, she qualified for the U.S. Golf Association Girls' Junior Championship in 2019. After learning of the elimination of her team, Pipatjarasgit investigated the possibility of a transfer, only to find that it was too late in the year to transfer to a comparable institution for the following year.

29. **Skiing.** Women's Skiing finished third in the United States in slalom at the 2020 USCSA National Championships and fourth at the USCSA Eastern Regionals. Women's Skiing consistently qualified for post-season competition, reporting in 2017 that it was their thirteenth year in a row of qualifying. That year, Brown finished in third place overall.

30. **Squash.** Women's Squash competed at the CSA National Championship Kurtz Cup in February 2020 and is ranked twelfth in national standings (50 total teams). At that Championship, the Brown team was awarded the sportsmanship award, which is voted on by all of college squash.

a. Alexa Jacobs, a member of the team and of the Brown class of 2021, was slated to be co-captain of next year's team—her last opportunity to compete at the intercollegiate level. In May 2020, just days before the team was cut, women's squash honored Jacobs for the best record at the Howe Cup Team Nationals, as well as a CSA Scholar-Athlete, and announced two recruited athletes to the incoming freshman class.

31. In this Motion, Plaintiffs seek immediate relief from Brown's decision to eliminate the five women's varsity teams. Plaintiffs seek expedited consideration of this motion, including re-assignment to a judge sitting in the District of Rhode Island, issuance of an order prohibiting implementation of the announced team eliminations, expedited discovery, and a prompt hearing on Plaintiffs' motion.

32. Plaintiffs have filed a Memorandum of Fact and Law and supporting documents contemporaneously with this motion.

WHEREFORE Plaintiffs respectfully request that the Court enforce the Joint Agreement to ensure Defendants provide Plaintiffs with equal athletic opportunities at Brown pursuant to Title IX, the Joint Agreement, statutory authority, and relevant case law. Plaintiffs also request the Court enjoin Defendants from eliminating any women's intercollegiate athletic varsity teams unless and until they are able to prove that the elimination of these teams will not violate the Court's Judgement and the Joint Agreement. Plaintiffs further pray that the Court issue an Order to

Defendants to show cause why they should not be held in civil contempt of the Judgment of October 15, 1998, and schedule the matter for hearing thereon.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that on June 29, 2020, a true copy of this document was delivered electronically using the CM/ECF system to all counsel of record and was further sent by email to the following counsel for defendants:

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TUNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

AMY COHEN, et al., PLAINTIFFS, v. BROWN UNIVERSITY, CHRISTINA PAXSON, as successor to VARTAN GREGORIAN, and JACK HAYES, as successor to DAVID ROACH DEFENDANTS	EXPEDITED RELIEF REQUESTED Case Number: 92-CV-0197

PLAINTIFFS' MEMORANDUM OF FACT AND LAW IN SUPPORT OF THEIR MOTION TO ENFORCE JUDGMENT, TO ADJUDGE IN CONTEMPT AND FOR EMERGENCY RELIEF

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INTRODUCTION

Plaintiffs, members of a certified class of women varsity athletes and potential athletes at Brown University, by their undersigned class counsel, hereby move the Court to enforce the Joint Agreement of the parties, incorporated in the Judgment of the Court, entered on October 15, 1998, after notice to the class and hearing. The Joint Agreement constitutes the binding agreement of the parties on Brown's plan for compliance with Title IX of the Education Amendments, 20 U.S.C. §1681, as to its intercollegiate athletic program. Plaintiffs seek to prevent the Defendants from proceeding with actions to eliminate five women's varsity teams, announced on May 28, 2020, as revised on June 9, 2020, which, if allowed to be implemented, would constitute a gross violation of the Joint Agreement, to the immediate and irreparable harm of the class. Defendants Brown University et al. ("Brown") have announced that the actions are "effective immediately."

Prior to filing the within Motion, in accordance with paragraph V.E. of the Joint Agreement,[1] undersigned counsel notified Defendants on June 10, 2020, that their proposed plan

[1] The Joint Agreement is attached as Exhibit A to the Motion to Enforce. Paragraph V.E. provides that "Plaintiffs may, in the case of an alleged gross violation of this Agreement, seek relief from the Court, *provided* that they have first notified Defendants of the alleged gross violation and spent a reasonable period of time meeting and conferring with Defendants in an attempt to resolve the issue." (Emphasis in original.)

was a gross violation and thereafter conferred with counsel for the Defendants. But we have been unable to achieve a resolution that would avoid this violation and the need for emergency relief.

Plaintiffs seek immediate relief because Brown's decision to eliminate the five women's varsity teams threatens to harm the teams in ways a later order of restoration would not adequately address. These harms include, among other injuries, loss of coaching staff (who may obtain other employment), cessation of recruiting activities (to maintain viable team participants), and removal of these teams from intercollegiate conference and post-season schedules (which may not be remediable once the schedules have been announced). Plaintiffs therefore seek expedited consideration of this motion, including re-assignment to a judge sitting in the District of Rhode Island, issuance of an order prohibiting implementation of the announced team eliminations, expedited discovery, and a prompt hearing on Plaintiffs' motion.

STATEMENT OF RELEVANT FACTS

A. Prior Proceedings.[2]

In May 1991, Brown University announced the elimination of four teams from its university-funded varsity program. Women's gymnastics and volleyball, along with men's golf and water polo, were lowered to "club varsity," later called "intercollegiate club." These teams lost, among other things, university financial support, university-funded coaching staff, access to trainers, varsity equipment and facilities, and preference in admissions for recruited athletes. In this "hybrid" status, the teams were advised that they could continue to compete at the varsity level *if* they self-funded and *if* other institutions were willing to continue to include them in their

[2] The description of prior proceedings which follows is not exhaustive and focuses on the issues, binding findings of fact, and binding conclusions of law pertinent to the matters presently at issue.

schedule. *Cohen v. Brown University,* 809 F. Supp. 978, 981-982 (D.R.I. 1992) ("*Cohen I*"), *aff'd,* 991 F.2d 888 (1st Cir. 1993) ("*Cohen II*").

Plaintiffs, members of the two demoted teams, as well as other women athletes, filed a class action suit in 1992, alleging that Brown had violated Title IX of the Education Amendments, 20 U.S.C. §1681 ("Title IX"), by cutting the teams, by not offering equivalent participation opportunities to other women, and by maintaining programmatic inequities between the men's and women's varsity programs. The Court certified a plaintiff class of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." *Cohen I*, 809 F. Supp. at 979.

Plaintiffs sought a preliminary injunction restoring the two teams to full varsity status. After a lengthy hearing, the Court determined that Plaintiffs had demonstrated a likelihood of success in their claim of a Title IX violation and that Plaintiffs had demonstrated that the class would suffer irreparable harm if the teams were not restored to varsity status pending determination on the merits.

In reaching its decision, the Court found, among other things, that "intercollegiate club status is not equivalent to varsity status." *Id.* at 992. The Court found "a strong likelihood of irreparable harm in three major areas": recruitment, diminution of competitive level and access to varsity competition, and loss of coaching staff. *Id.* at 997-998. As a result of the loss of university funding, each of the women's teams was "struggling not only to remain active in varsity-level competition at Brown, but also to survive as a team at all." *Id.* at 992.

Recognizing a dearth of prior precedent, the Court conducted an extensive analysis of the requirements and history of Title IX and its controlling regulations and agency interpretations, and

granted a preliminary injunction ordering Brown to restore the two women's teams as fully-funded varsity teams, with all levels of support as existed before the cuts, and prohibiting Brown from cutting, or reducing the level of support of, any other women's varsity pending decision on the merits. *Id.* at 1001. On appeal, the First Circuit unanimously affirmed. *Cohen II*, 991 F.2d 888. The Court's decision in *Cohen II* is the first appellate decision addressing the application of Title IX to athletics and the "Three-Part Test" relied upon by the Court below and continues to be extensively cited. *Id.* at 897.

In 1994, the case proceeded to trial on the merits, and a decision in favor of Plaintiffs issued in 1995. *Cohen v. Brown University,* 879 F. Supp. 185 (D.R.I. 1995) (*Cohen III*), *aff'd in part and rev'd in part,* 101 F.3d 155 (1st Cir. 1996) (*Cohen IV*), *cert. denied,* 520 U.S. 1186 (1997). By that time, Brown was using the term "donor-funded" varsity to denote teams which could compete at the varsity level *if* they self-funded. As to true "club" teams, the Court stated that "[i]t was not seriously contended until the eleventh hour, nor did the evidence show, that any of Brown's club teams should be considered to be presently operating as intercollegiate teams" under the controlling standards. *Cohen III*, 879 F. Supp. at 200. While the Court considered the donor-funded teams to fit within the varsity program, it further found that "[a]s a result of their unfunded status, most of the donor-funded teams are prevented from reaching their full athletic potential." *Id.* at 201 (footnote omitted).

The Court once again addressed Brown's compliance with the "Three-Part Test" of the Policy Interpretation issued by the Department of Education to enforce its Athletic Regulations, 34 C.F.R. §106.41(c)(1). Prong One of the Test—relevant to post-judgment enforcement—asks "[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." *Cohen III*, 879

F. Supp. at 200 (quoting Three-Part Test, 44 Fed. Reg. at 71,418 (1979)). In response to Brown's argument that it should have substantial leeway in the measurement of Prong One because the composition and size of the program is out of its control, the Court observed that "fluctuations, from year to year, of the gender balance in the athletic program at Brown were minimal," *Id.* at 202, and "Brown does predetermine the gender balance of its athletic program through the selection of the sports it offers…, the size of the teams it maintains…, the quality and number of coaches it hires, and the recruiting and admissions practices it implements." *Id.* (citation omitted). "Most coaches testified that they determine an ideal team size and then recruit the requisite number of athletes to reach that goal." *Id.* Rejecting a number of alternative methods proposed by Brown to quantify "participation opportunities," the Court concluded that "[n]umbers from the *current* or most recent, complete competitive season provide the most representative quantification of participation opportunities *presently* offered." *Id.* at 203-204 (emphasis in original).

The Court found that Brown was not in compliance with any prong of the Three-Part Test. It found that Brown had failed to "fully and effectively accommodate the interests and abilities" of women by offering water polo as a club sport and by offering gymnastics, fencing, and skiing at the "donor-funded" level. *Id.* at 212. Brown was directed to submit a plan to come into compliance with Title IX. *Id.* at 214.

In a separate, unpublished Order of August 17, 1995 ("Remedial Order),[3] the Court rejected Brown's proposed compliance plan. Among other things, Brown proposed to strictly enforce team sizes by (one) imposing maximum team sizes on men's teams by striking excess names from the team roster; and (two) imposing minimum team sizes on the women's teams. In addition, Brown

[3] The Court's Remedial Order of August 17, 1995 is attached to the Motion to Enforce as Exhibit B.

proposed to create new "junior varsity teams" for certain women's sports and to count their members as well.

The Court rejected the proposal in its entirety, as "indicat[ing] a regrettable lack of interest in providing an intercollegiate athletic experience for its female students that is equivalent to that provided to its males students." Remedial Order at 7 (footnote omitted). "An institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons." Remedial Order at 8. The Court further rejected Brown's proposal to include "junior varsity" teams in the count as not constituting intercollegiate teams. "Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women." Remedial Order at 6 (footnote omitted). The Court did not give Brown another opportunity to submit a new plan, instead ordering Brown to elevate women's gymnastics, water polo, skiing and fencing to university-funded status, but staying the order pending appeal. Order at 12.[4]

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

[4] Brown had previously restored women's volleyball to full varsity status.

The matter returned to this Court for determination of relief. By the time it was to be heard on remedy, the case was reassigned to District Judge Torres.

On the eve of hearing on remedy, the parties resolved the issue of compliance with a "Joint Agreement" subject to approval of the Court after notice to the class and hearing on fairness of the settlement. After hearing, the Joint Agreement was approved by Judge Torres and incorporated as the Judgment of the Court on October 15, 1998.

B. The Joint Agreement.

The Joint Agreement is designed to address Brown's decision to achieve and maintain compliance under Prong One of the Three Part Test[5] by setting forth how participants are counted and by specifying the permissible differential between women undergraduates and women athletes at Brown. (A copy of the Joint Agreement is attached to the accompanying Motion to Enforce as Exhibit A.) It identifies the teams that were then part of Brown's varsity program. It specifies that Brown's variance between undergraduate enrollment and athletic participation rates for women can be as high as 3.5%—which represents over 30 individuals in a program of 890,[6]—but that the permitted variance will drop to 2.25% if Brown alters the current lineup of varsity teams in a way adverse to women, e.g., by reducing the status of or eliminating a women's team or creating or elevating the status of a men's team.

While several provisions guaranteed financial support for donor-funded teams and were limited in duration, the Joint Agreement specifies that it "is indefinite in duration as to those

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[5] In contrast, the Court's remedial Order of August 17, 1995, envisioned compliance under Prong Three, by fully and effectively accommodating the interests and abilities of the underrepresented gender, which would have left Brown free to have a corresponding men's program without reference to the size or proportionality of either program. Remedial Order at 11.

[6] Brown's total program of men and women typically equals or exceeds 890 athletes each year.

provisions concerning measurement of participation rates by applicable percentages (proportionality)." The Joint Agreement specifies that any party who seeks relief from the terms of the Joint Agreement must seek Court approval and cannot unilaterally ignore the obligations imposed by it. The Joint Agreement, at page 17, expressly states that the "terms of this Agreement shall be subject to the full enforcement powers of the Court by appropriate order. *The Court shall retain jurisdiction concerning interpretation, enforcement and compliance with this Agreement."* (Emphasis added.)

The Joint Agreement further provides that participation ratios are determined retrospectively, by counting the individuals actually participating on varsity teams whose name appears on the roster for that sport on the first and last day of competition and taking the average of those two numbers. Each team is counted separately, except for indoor and outdoor track, which are counted as a single sport. Joint Agreement at 10-11.

C. History of Enforcement.

The Joint Agreement has been in operation since 1998. Every August, Brown has provided class counsel with reports of its program and participants for the academic year just concluded. Over the past 20 years, Brown has failed to achieve compliance at the 3.5% level in 2000-2001 (3.7%), 2001-2202 (4.8%), 2004-2005 (4.4%) and 2009-2010 (5.6%). In those years, Brown notified class counsel of the noncompliance and took action to address and correct the issues leading to noncompliance. On each occasion, Brown rectified the noncompliance without any need for judicial intervention.

In 2000, Brown approached class counsel to propose the formal recognition of a women's golf team and a men's golf team within the co-ed golf program which would not alter the structure of the varsity program but would add post-season competitions for the women's program. Brown sought Plaintiffs' and the Court's agreement that the action would not trigger the "drop-down" in

permitted variance from 3.5% to 2.25%. Plaintiffs agreed, and the parties submitted, and the Court entered, an Order by Consent in July 2000.[7]

D. Brown's Unilateral Elimination of Women's Sports with No Advance Notice or Consultation.

On May 28, 2020, simultaneous with notice to the affected athletes, counsel for Brown telephoned class counsel, Labinger, to advise that Brown was, effective immediately, removing five women's and six men's teams from the varsity program, and creating two varsity sailing teams, called women's and co-ed sailing. Brown's counsel acknowledged that the actions would trigger the Joint Agreement's drop-down to 2.25% and represented that Brown's new program would meet that requirement. The teams were identified as men's and women's golf, fencing, and squash, women's skiing and equestrian, and men's cross-country, indoor/outdoor track and field.

In the official statement issued by the President of Brown that day, Brown represented that "[e]ffective immediately, Brown will cease training, competition and related operations at the varsity level for the following sports: men and women's fencing; men and women's golf; women's skiing; men and women's squash; women's equestrian; and men's track, field and cross country." Christina Paxson, *Excellence initiative to reshape athletics at Brown* (May 28, 2020) https://www.brown.edu/about/administration/president/statements/excellence-initiative-reshape-athletics-brown. The President noted that many of the sports might continue at the club level. *Id*.

The President further represented that Brown would remain in compliance with the Joint Agreement and that "the percentage of varsity athletic participation opportunities for women will

[7] In 1999, due to recusal, no sitting judge in the District was available for assignment when matters relating to attorneys' fees and entry of the post-judgment consent order were heard by U.S. Magistrate Judge Martin and Chief Judge Paul Barbadoro of the District of New Hampshire between 1999 and 2003.

increase, and be even more closely aligned with the percentage of women in the undergraduate student body." *Id*.

In an accompanying post on Brown's "News from Brown,"[8] the University described its decision to cut the teams as part of a "bold plan to reshape its athletic program" that was the product of its "Excellence in Brown Athletics Initiative." Brown said that "[t]he Initiative's launch follows a deliberative process that dates back to an external review of Brown Athletics conducted in the 2018-2019 academic year, which found that the high number of varsity sports at Brown was a barrier to competitiveness." Brown emphasized that "while some universities have reduced athletics programs in the wake of COVID-19, Brown's initiative *is not* a measure to reduce budget or an effort to contend with the financial impact of the pandemic." *Id.* (emphasis added) Rather, said Brown, "it's an opportunity to invest further in advancing excellence in Brown's full lineup of sports programs." *Id.* Brown further represented that "[g]ender equity was among the most essential criteria for decision-making for the revised lineup of teams," with specific reference to Brown's obligation to maintain compliance with the Joint Agreement.

Brown's decision to slash eleven men's and women's varsity teams was met with a groundswell of opposition from both within and outside the University. Brown initially refused to back down. On June 6, 2020, the President issued another public letter confirming the University's commitment to proceed with the elimination of all of the teams. *See* Christina Paxson, Addressing Brown varsity sports decisions (June 6, 2020), https://www.brown.edu/about/administration/president/statements/addressing-brown-varsity-sports-decisions.

[8] *New initiative to reshape, improve competitiveness in Brown varsity and club athletics* (May 28, 2020) https://www.brown.edu/news/2020-05-28/athletics-excellence.

In that letter, Brown's President identified "Gender Equity" as one of the core concepts that drove the decision, including the number and selection of varsity teams to cut. The President stated:

> Under the 1998 legal settlement, which applies only to Brown and not to other universities, the fraction of athletics opportunities for women must remain within a tight band around the fraction of the undergraduate population that is women. As the fraction of women in the undergraduate student body has increased over time (currently at about 53%), it has become more challenging for Brown to meet its obligations under the settlement agreement and Title IX given the number of teams we have. In the past, the University has achieved the required gender balance by maintaining squad sizes of men's teams that, on average, are below Ivy League squad sizes.

Id. Brown's President further stated that,

> in [the Committee's] judgment, *the best way to restore competitiveness and meet the goal of reducing the number of teams overall was to eliminate a number of larger men's teams. This was an important factor in the decision to eliminate men's track, field and cross-country* which, together, provide the most varsity opportunities to men second only to football—the latter of which is a required sport for membership in the Ivy League.

Id. (emphasis added). She added that, "[s]ince the announcement of the athletics initiative, there have been requests to restore men's track, field and cross-country; however if these sports were restored at their current levels and no other changes were made, *Brown would not be in compliance with our legal obligations under the settlement agreement.* We continue to closely examine Brown's legal obligations." *Id.* (emphasis added).

On June 9, 2020, however, the University announced that it *was* restoring men's track, field, and cross-country.[9] *And no other changes were made.* Taking President Christine Paxson at

[9] Letter from President Paxson: Track and field and cross country (June 10, 2020) https://www.brown.edu/news/2020-06-09/track. "The reinstatement is effective immediately and does not alter other decisions to reduce the number of varsity sports as part of the initiative."

her word, Brown is knowingly and intentionally violating the settlement agreement. Moreover, the participation numbers provided by Brown bear that out. As the tables in Plaintiffs' Motion, repeated below, show, Brown's decision to eliminate these three men's teams and five women's team will dramatically and unequivocally violate the Joint Agreement's requirement that the percentage of the underrepresented gender in the athletic population (which, at Brown, has always been women) must be within 2.25% of the percentage of that gender in the overall student body.[10]

E. Plaintiffs Invoke Section V.E. of the Joint Agreement for Violation but Are Unable to Achieve Resolution Without Court Intervention.

On June 10, 2020, Plaintiffs' counsel notified Brown, through its counsel, that Brown's decision to cut five viable women's teams from the varsity program constitutes a "gross violation" of the Joint Agreement within the meaning of Section V.E, for which Plaintiffs are authorized to seek direct court intervention after notice and a reasonable period of time to meet and confer in an attempt to resolve the issue.

In an effort to resolve the issue amicably and better understand the bases for Brown's decision, class counsel sought a variety of data from Brown, including the analyses, modeling, and recommendations on which Brown, and its committees, had based its *initial* decision to cut all six men's sports teams, including men's track, field and cross-country, and its *subsequent* decision to *not* eliminate men's track, field and cross-country. Brown has refused to provide this information.[11]

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[10] Throughout the last 22 years of operation of the Joint Agreement, not once have women athletes at Brown ever reached their proportion within the undergraduate enrollment and at all times have remained the "underrepresented" gender.

[11] On June 10 and 11, Plaintiffs requested production of reports, resolutions, and analyses of the decision-making leading up to the determination to cut the five women's teams and that only by cutting men's track, field and cross-country would Brown comply with the Settlement Agreement. In its public postings, Brown had described a long and considered deliberative process, comprised of proceedings and deliberations of consultants, a Presidential Committee on

Plaintiffs also asked Brown to explain why, in its view, its new version of the cuts would achieve compliance at the 2.25% level mandated by the Joint Agreement, and to provide any analysis Brown had conducted to reach its decision. Brown initially represented that it did not yet have that information. On June 16, 2020, Brown told Plaintiffs that its new plan would comply with the Joint Agreement because, among other things, it proposed to add 25 participation opportunities for women athletes on a woman's sailing team and 25 participation opportunities for women on a coed sailing team. But the names provided to class counsel for these two teams are *the same 25 women.*

Brown also provided class counsel with projected participation numbers for teams for the 2020-21 year on which it based its claim that it would be in compliance. Brown did not provide any projection of the undergraduate enrollment of women at Brown for 2020-21, contending such numbers are unavailable.[12]

Excellence in Athletics, internal review within Athletics, and the Office of the President, culminating in review and approval by the Board of Trustees. A copy of the request is appended as Exhibit G. Brown declined to provide any of the requested materials.

On June 18, 2020, class counsel asked Defendants to provide them with all data, reports, analyses, and other information leading up to and forming the basis for the decision to reinstate the men's track, field, and cross country teams and make no other changes. Defendants have refused to provide all such information. Plaintiffs also requested Brown's June or preseason team rosters for the last three academic years and any written plans that exist for the creation of the coed and/or women's varsity sailing program. Brown has not provided this information. Plaintiffs also asked Brown when, if at all, it would make the sailing coach and the administrative person(s) who knows the most about the proposed varsity sailing program available for interviews. Brown has not responded to those requests.

[12] In making its projections, Brown used estimated team sizes based on its projections for 2020-21, but used the 2019-20 rate of 52.3% women undergraduates, claiming it had no additional information. The Joint Agreement, however, requires women's athletic participation rate for 2020-21 to be within 2.25% of women's undergraduate enrollment rate "for the same academic year." Moreover, President Paxson, in her letter of June 6, 2020, stated that undergraduate enrollment for women is "currently at about 53%."

After reviewing Brown's information, class counsel concluded that there is substantial reason to doubt Brown's projections and to reject Brown's reliance upon them. Plaintiffs invited Brown to confer to attempt a resolution of the dispute. Brown declined, taking the position that its revised plan complies with the Joint Agreement.

In light of that decision, Plaintiffs have no choice but to seek judicial intervention.

ARGUMENT

I. THIS COURT SHOULD ENJOIN BROWN FROM IMPLEMENTING ITS PLAN TO CUT FIVE EXISTING, VIABLE WOMEN'S INTERCOLLEGIATE ATHLETIC VARITY TEAMS BECAUSE THAT PLAN VIOLATES THE JOINT AGREEMENT.

A. Brown's Announced Elimination of Women's Teams Disproportionately Harms Women Athletes at Brown, in Violation of the Joint Agreement.

Plaintiffs are seeking enforcement of the Judgment of the Court, which incorporated the Joint Agreement, and which expressly provides for continued enforcement by the Court in the event of a violation or effort to obtain modification or termination.

As explained in further detail below, Brown's decision to eliminate three men's and five women's intercollegiate athletic teams violates the 2.25% participation requirement set forth in the Joint Agreement. Brown is proposing to eliminate (depending on which year's figures are used) *twice as many* women's participation opportunities as men's. This will place Brown far outside the maximum 2.25% participation rate difference required—indeed, it will prevent Brown from satisfying even the maximum 3.5% participation rate difference that applied when Brown had *not* eliminated any women's teams.

Brown's arguments to the contrary are based on expectations and projections where the Joint Agreement mandates reliance on actual data. Among other things, Brown's claim of compliance depends upon achieving participation rates that its actual experience does not support and the addition of women participating in a varsity program that does not yet exist. Brown's plan

also double counts the female athletes that Brown contends will participate in *both* the women's and co-ed sailing programs in the 2020-2021 season. Because Brown's plan will place it in clear violation of the Joint Agreement, Plaintiffs are asking this Court to enjoin Brown from implementing its current proposal.

To be clear, Plaintiffs do *not* take the position that Brown lacks authority to eliminate any intercollegiate athletics teams. But Brown has a duty, under both Title IX and the Joint Agreement, to not discriminate on the basis of gender when deciding to eliminate athletic participation opportunities. Brown's initial plan to eliminate six men's teams and five women's teams, although entirely regrettable, appeared to be designed to achieve the 2.25% permitted variance.

But Brown's decision to reinstate men's track, field and cross-country teams—while pressing forward with the elimination of five women's teams—*will* violate the Joint Agreement, That's all Plaintiffs are asking for here: that they be treated fairly and equitably as required by Title IX *and* by the Joint Agreement that Brown itself agreed to abide by in 1998, and which remains in effect to this day.

1. <u>This Court Has the Authority to Enforce the Joint Agreement.</u>

As a threshold matter, this Court plainly has the authority to enjoin Brown from implementing its unlawful plan. The Court has inherent authority to enforce its judgments. *See generally Burgos-Yantin v. Municipality of Juana Diaz*, 909 F.3d 1, 3 (1st Cir. 2018) (collecting cases). *See also* 28 U.S.C. §2202. While an order of enforcement and a finding of contempt often go hand-in-hand, they are two separate analyses. *See, e.g., Paiva v. Rhode Island Dep't of Corr.*, 2020 WL 430062 (D.R.I. 2020) (issuing an order of compliance but denying a finding of contempt). *See also Ollier v. Sweetwater Union High School District*, 2014 WL 1028431 (S.D. Cal. 2014) (granting a motion to enforce the judgment and issuing a show cause order in a Title IX case). As the Supreme Court has explained, "courts have inherent power to enforce compliance

with their lawful orders through civil contempt. When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers." *Spallone v. United States*, 493 U.S. 265, 276 (1990) (internal quotation marks and citations omitted). "The Court may impose civil contempt 'to compel compliance with a court order or to compensate a party harmed by non-compliance.'" *Paiva,* 2020 WL 430062, at *6 (quoting *United States v. Saccoccia*, 433 F.3d 19, 27 (1st Cir. 2005)).

The Joint Agreement explicitly recognizes this authority. "This [*sic*] terms of this Agreement shall be subject to the full enforcement powers of the Court by appropriate order. The Court shall retain jurisdiction concerning interpretation, enforcement and compliance with this Agreement." Joint Agreement at VI [V.C.], at 17.

2. <u>Brown's Proposal Would Violate the Joint Agreement.</u>

There is also no doubt that Brown's plan would violate the maximum 2.25% participation difference requirement in the Joint Agreement. This conclusion comes directly from Brown's own data provided to Plaintiffs during the course of the parties' effort to resolve this situation without judicial intervention.

Defendants have provided class counsel with intercollegiate athletic participation numbers for 2019–20 and 2018–19 that show why President Paxson made her June 6 announcement. Based on the numbers Brown provided, if the five women's teams were eliminated along with the six men's teams originally included (including track, field, and cross country), then women's opportunities would be (depending on the year) 42.15% or 42.72% of the total eliminated—bringing women *closer* to equality in Brown's program. But with men's track, field, and cross country reinstated and no other changes made, women's opportunities will be (depending on the year) 66.83% or 69.35% of the total eliminated—bringing women *farther* from equality in Brown's program.

Teams Eliminated		Number of participants 2019-20	Number of participants 2018-19
Women's			
	Equestrian	23.5	21.5
	Fencing	12	13.5
	Golf	9	11
	Skiing	10	9
	Squash	14	14
Total		**68.5**	**69**
Men's			
	Fencing	11	8.5
	Golf	8	8.5
	Squash	15	13.5
(Reinstated)			
	Cross Country	15	17
	Track and Field	45	45
Total Eliminated Originally		**94**	**92.5**
Total Eliminated Now		**34**	**30.5**
Total Women's % Originally		**42.15%**	**42.72%**
Total Women's % Now		**66.83%**	**69.35%**

As a result, based upon the participations numbers Brown has provided for 2019–2020, if the five women's teams were eliminated along with the six men's teams originally included (including track, field, and cross country), the participation rates for men and women in Brown's 2020–21 intercollegiate athletic program would likely have been within 2.25% of their undergraduate enrollment rate for 2019–20. (We do not yet know the undergraduate enrollment rates for 2020-21.) But, with the men's track, field, and cross-country teams reinstated, the participation rates for men and women rates in Brown's 2020–21 intercollegiate athletic program will be 4.4% from their undergraduate enrollment rate for 2019–20:

2019-2020 Total Undergraduates	
Men	3249
Women	3561
Percentage of Women	52.29%
Total Number of Athletes with All 11 Teams Eliminated	
Men	354
Women	380.5
Percentage of Women	51.80%
Total Number of Athletes after 3 Men's Teams Reinstated	
Men	414
Women	380.5
Percentage of Women	47.89%
Difference from Undergraduate Percentage Rates	
With All 11 Teams Eliminated	0.49%
After 3 Men's Teams Reinstated	4.40%

Thus, Brown has announced that it will eliminate participation opportunities for twice as many women as for men.

For 2019-20, Brown reported that women represented 52.29% of the undergraduate enrollment and 50.06% of the women varsity athletes, producing a differential of 2.23%. However, of the total women participating (449), 68.5 were on the teams designated for elimination. Of the total men participating (448), 34 were on the teams designated for elimination. Without those participants, the athletic program provided for women would be 4.40% less than their representation in the undergraduate enrollment for 2019-20.

For 2018-19, Brown reported that women represented 53.72% of the undergraduate enrollment and 51.04% of the women varsity athletes, producing a differential of 2.68%. However, of the total women participating (466.5), 69 were on the teams designated for elimination. Of the total men participating (447.5), 30.5 were on the teams designated for elimination. Without those

participants, the athletic program provided for women would be 4.91% less than their representation in the undergraduate enrollment for 2019-20.

Based on these numbers, Brown would not merely fail to comply with the drop-down 2.25%; it would not be in compliance with the more lenient 3.5% variance which it has lost by eliminating women's sports.

3. Brown's Contention that Its Plan Would Not Violate the Joint Agreement is Based on Imaginary and Unrealistic Numbers.

Brown has offered Plaintiffs no serious reason to doubt this conclusion. When Brown announced its original decision to cut six men's teams and five women's teams, it said this balance of teams was necessary to maintain compliance with the Joint Agreement. When Brown revised that plan and decided to reinstate men's track, field, and cross country, it offered no explanation as to why its plans would not violate the Joint Agreement. That's no surprise, because, now, Brown's plans *do* violate the Agreement.

Brown's claim that it will achieve compliance at the 2.25% in 2020-21 is not based on current facts but rather hopeful projections about larger team sizes for remaining women's teams and the creation of a new varsity program in sailing that counts the projected 25 new women participants not once but twice and restricts the number of men (who apparently sail the co-ed boats in equal numbers with women) to 10, or less than half of the number of women Brown is counting on to participate. Brown's proposal is inadequate on its face, because neither of these teams yet exists and, according to Brown, each will *have the same women on them.* So Brown is not only double-counting athletic participation opportunities, but it is doing so for a varsity program that does not yet exist.

This is manifestly improper. First, Brown's reliance on the composition and size of a varsity team that *does not yet exist* to demonstrate proportionality or compliance with the Joint

Agreement is grossly misplaced. As one court has explained, "[y]ou can't replace programs with promises." *See Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578, 585 (W.D. Pa.), *aff'd,* 7 F.3d 332 (3d Cir. 1993). But that's exactly what Brown is doing here: promising that the violation of Title IX embodied in its proposal to cut five existing teams will be counterbalanced by a varsity program that does not yet exist. Brown cannot sidestep the requirements of either Title IX or the Joint Agreement by providing estimated numbers to replace actual participants.[13]

The fact that a coed sailing program has operated at Brown for many years at the club level does not alter this analysis. It is well established—and the law of *this* case—that a club sport is *not* a varsity sport, either under the Joint Agreement or under controlling law. *See Cohen III*, 879 F. Supp. at 200 (*quoted supra*). The rules, requirements, and members of a *varsity* sailing program have not been established, and its members cannot be counted, under the Joint Agreement or the law, prospectively. *See* 34 C.F.R. § 668.47 (requiring institutions to count participation using "[t]he total number of participants as of the day of its first scheduled contest of the reporting year").

And any such measure would be a mere prediction that could ultimately prove no more than wishful thinking. Not all athletes at the club level may wish to subject themselves to the varsity-level requirements. Moreover, individual expressions of intent to participate before the first date of competition are not the measurement of participation under the Joint Agreement. *See* Joint Agreement Section III.F.2-4. Indeed, expressions of intent or interest, as opposed to actual participation, were championed by Brown as a more accurate way to measure "participation opportunities" *and rejected by the Court* in *Cohen III*. *See* 879 F. Supp. at 203-04.

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[13] While the district court in *Favia* was analyzing a promise to promote a club sport to a varsity sport in regards to the university's ability to show compliance with Prong Two, it is axiomatic that if a university cannot rely on an as-yet non-existent team to demonstrate compliance with Prong Two, then they cannot use "numbers" from a non-existent team to meet the requirements of Prong One.

Additionally, Brown has acknowledged that the coed sailing will not be eligible to compete in a conference championship because there are not enough teams in the Ivy League to qualify for a championship. *See* Emails from Brown's Counsel, Exhibit C. This raises further questions as to the propriety of Brown's reliance upon double-counting women as participants on two sailing teams as it is unclear if they will receive an equivalent participation opportunity to the teams that were eliminated or even the women's sailing program. *See* Letter from Stephanie Monroe, Assistant Secretary for Civil Rights of the Department of Education (Sept. 17, 2008) ("2008 OCR Letter") (listing ability for post-season championship among its factors for counting a sport as a genuine athletic opportunity); *see also Biediger v. Quinnipiac Univ*., 691 F.3d 85, 104 (2d Cir. 2012) (discussing the same).

Whether or not a sailing program can be established at Brown and successfully compete at the varsity level in the future does not change the fact that Brown's claim that it will meet the maximum variance of 2.25% is based on *projections* of athletes who have not yet had a single season at the varsity level.

Brown's proposal is fatally flawed for another reason: it is based on the dubious legal proposition that the same women who may hereafter compete at the varsity level for sailing should be counted *twice* because their program permits them to sail in competition on a women's boat or a co-ed boat with men. If the history of this case tells us anything, it is that Brown and the Plaintiff class rarely agreed on how to measure or count genuine participation opportunities—which is why every detail for the *existing* program was spelled out in the Joint Agreement or by later consent order. The Joint Agreement included contingencies for certain teams that might be elevated to university-funded varsity status, but there is no provision for a varsity sailing team that dictates

how the new program, once it is established, should be counted or measured, and Brown has deliberately excluded Plaintiffs from the discussion.

But, even if double-counting female athletes who participate on both women's sailing and co-ed sailing could be justified, Brown's proposal must be rejected because it proposes to count future varsity opportunities while eliminating current, actual ones. As we now explain, Plaintiffs cannot afford to wait to see if Brown's projections are accurate enough without risking devastating consequences to real individuals who are being denied their chance to compete.

B. Interim Relief is Required to Preserve the Status Quo Ante and Avoid Irreparable Harm.

Plaintiffs seek an order requiring the preservation of each of the five varsity women's teams eliminated from Brown's varsity program until the Court can determine whether Brown is in compliance with the Joint Agreement. Only preservation of the status quo immediately before Brown announced the team eliminations will avoid irreparable harm from Brown's gross violation of the Joint Agreement.

Brown's claim that it *will* achieve 2.25% compliance is based on a projection of conditions that do not and may never exist. If Plaintiffs are required to wait until the Fall to see if Brown's plan complies with the Joint Agreement, it will be too late to provide effective relief for the class members who have lost their competitive opportunities.

This is true for at least two reasons. First, a later opportunity to compete cannot and does not replace the ones that are lost, particularly for athletes who have a finite number of seasons or years to compete. Second, a team cut from varsity status loses its ability to retain its coaches, its schedule, and its caliber of athletes, such that a later order to restore it to varsity status typically means either that there is no team to restore or that it needs to be completely rebuilt. In the meantime, competitive opportunities disappear.

The prior litigation in this case confirms that interim relief is necessary to protect the athletes by preserving the status quo. In 1992, in *Cohen I,* the Court concluded that the Plaintiffs and class members would suffer irreparable harm if Brown's action to remove them from the varsity program were to stand while the Court determined whether Brown had violated Title IX. The Court found "a strong likelihood of irreparable harm in three major areas": recruitment, diminution of competitive level and access to varsity competition, and loss of coaching staff. *Cohen I*, 809 F. Supp. at 997-998. The Court found that the reduction in status from funded to unfunded "varsity" signaled the demise of the teams since each of the women's teams was "struggling not only to remain active in varsity-level competition at Brown, but also to survive as a team at all." *Id.* at 992. Here, the harm is even more complete, since Brown is eliminating *any* chance at varsity status and, "[e]ffective immediately, [terminating] training, competition and related operations at the varsity level." Paxson, *Excellence initiative to reshape athletics at Brown.*

Where sports have been eliminated, or threatened with elimination, courts finding a likelihood that Title IX has been violated have, by weight of authority, recognized that the cancellation of varsity sports at the college level represents irreparable harm for the athletes denied the opportunity to compete and have granted preliminary injunctive relief preventing the elimination while the case is pending. *See, e.g., Mayerova v. Eastern Michigan University*, 346 F. Supp. 3d 983 (E.D. Mich. 2018) ("In general, courts have found that the elimination of a women's team creates irreparable harm when the plaintiffs have demonstrated a strong likelihood of success on the merits of their Title IX claim." *Id*. at 997 (citations omitted)); *see also Portz v. St. Cloud State University,* 196 F. Supp. 3d 963, 972–73 (D. Minn. 2016); *Biediger v. Quinnipiac Univ*., 616 F. Supp. 2d 277, 291–93 (D. Conn. 2009); *Choike v. Slippery Rock Univ.*, No. 06-622, 2006, WL 2060576 at *9 (W.D. Pa. 2006); *Barrett v. West Chester Univ. of Penn.*, No. 03-cv-4978, 2003

WL 22803477 at *13–14 (E.D. Pa. 2003); *Favia*, 812 F. Supp. at 583. Of course, this Court already made that finding of fact in earlier proceedings in this matter, and the same holds true today:

> Plaintiffs face two irreparable harms. 'given the fleeting nature of college athletics,' a plaintiff suffers an irreparable harm if he or she los[es] the opportunity to participate in their sport of choice on a continuous and uninterrupted basis." *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 291 (D. Conn. 2009) (granting a preliminary injunction prohibiting the elimination of certain women's teams); *see also Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012) (affirming the district court's findings of fact and conclusions of law following a bench trial in the same case); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 302 n. 25 (2d Cir. 2004) (collecting cases and finding that the deprivation of the opportunity to play a sport constitutes an irreparable harm). Here, the harm Plaintiffs will suffer is on all fours with the harm at issue in *Biediger*: if SCSU eliminates the women's tennis team right away, and this case is not resolved in time for Plaintiffs to adequately prepare for and participate in the 2016-17 season—a very real possibility given the pace of modern day litigation—Plaintiffs would likely lose the opportunity to play at least one season of tennis at SCSU even if they later prevail in this case. And even if Plaintiffs' do later win, the temporary elimination of the women's tennis program would harm recruiting efforts for future tennis seasons and could make it difficult for SCSU to retain or hire coaches in the near term. Since Plaintiffs cannot wait for the long term—their time in college is limited—those effects would cost them dearly. The threat to Plaintiffs' participation in SCSU's women's tennis team is not a harm that can be repaired later with money; it would be irreparable.

Portz, 196 F.Supp.3d at 972.

At this writing, Brown has not announced its plans for the resumption of fall classes, nor has the Ivy League announced its plans for the resumption of fall sports. Neither of these uncertainties diminishes the ongoing and irreparable harm to the women athletes and the continued viability of their teams. Coaches work year-round and assessment and recruiting of new team members is ongoing even when classes are not in session or proceeding remotely. The eliminated teams, without coaches, recruiting or admissions preferences, lose their ability to survive, as this

Court has already found.

C. The Five Women's Teams and Their Members Slated for Elimination are Highly Accomplished and Will be Irreparably Harmed without Interim Relief.

Defendants should be prohibited from eliminating any of the women's teams unless and until they prove that their elimination will not violate the Joint Agreement and this Court's Decree. The teams and their members are highly accomplished and will be irreparably injured without such interim relief.

1. Equestrian.

The Women's Equestrian team at Brown is extremely successful. It won the Regional Championship in 2017-18, in which twelve collegiate teams competed. The team finished as the top team in its region (of 12 schools) in 11 out of the past 20 seasons and has finished in the top five nationally five times. Brown's Equestrian team has made more appearances at the nationals than all of the other Ivy League teams combined. Hannah Woolley, a member of the team and of the Brown class of 2021, placed second in two events at the 2018 Ivy Championships and qualified for post-season competition in 2019. Maya Taylor, a member of the team and of the Brown class of 2022, was recognized as the Academic All-Ivy recipient for 2018-19 and 2019-20 and was slated to be co-captain of the team for the next two years.

The team was standing in second place in the region when the 2019-20 season was terminated. There is no established club team for equestrian at Brown, and it is expected that the student "fees" or "dues" associated with a club equestrian team (there are none for a varsity) would pose a significant financial barrier for many to continue to participate even if offered.

2. Fencing.

Women's Fencing at Brown had a team member who captured third place at the NCAA Northeast Regional in 2020 and qualified for the 2020 NCAA Championships, which were not

held. The team has had four NCAA All-Americans since 2000. Casey Chan, a member of the team and of the Brown class of 2023, is a nationally ranked fencer, who qualified for the COVID-cancelled post-season competition but will never have a chance to compete at that level if she stays at Brown. Anna Susini, a member of the team and of the Brown class of 2022, was slated to be captain of the team in 2020-21. In applying for colleges, she limited her selection only to those offering varsity-level fencing. In 2020, Susini collected "First Team Foil honors" at the Northeast Fencing Conference.

3. Golf

Women's Golf at Brown had just installed a new coach in 2019-20 and announced three new recruited freshman on April 30, 2020. In the past eight years, the team has produced three Academic-All Ivy recipients, First and Second Team All-Ivy players, and won the Ivy League Championship in 2015. Winnie McCabe, a member of the team and of the Brown class of 2021, was twice recognized as an All-American by the Women's Golf Coaches Association. As a senior finishing her college career, this is her last opportunity to participate in her chosen varsity sport. Pinya Pipatjarasgit, a member of the team and of the Brown class of 2022, finished in fourth place at the Brown Bear Invitation in 2018. Outside of Brown, she qualified for the US Golf Association's 2019 U.S. Girls' Junior Championship in 2019. After learning of the elimination of her team, Pipatjarasgit investigated the possibility of a transfer, only to find that it was too late in the year to transfer to a comparable institution for the following year.

4. Skiing.

Women's Skiing finished third in the United States in slalom at the 2020 USCSA National Championships and fourth at the USCSA Eastern Regionals. Women's Skiing consistently

qualified for post-season competition, reporting in 2017 that it was their thirteen year in a row of qualifying. That year Brown finished in third place overall.

5. Squash.

Women's Squash competed at the CSA National Championship Kurtz Cup in February 2020, and is ranked twelfth in national standings (50 total teams). At the Championship, the Brown team was awarded the sportsmanship award, which is voted on by all of college squash. Alexa Jacobs (who plays the number one position), a member of the team and of the Brown class of 2021, was slated to be co-captain of next year's team—her last opportunity to compete at the collegiate level. In May 2020, just days before the team was cut, women's squash honored Jacobs for the best record at the Howe Cup Team Nationals, as well as a CSA Scholar-Athlete, and announced two recruited athletes to the incoming freshman class.

Conclusion

Plaintiffs have shown that Defendants' decision to eliminate five women's varsity sports has caused Defendants to be in gross violation of the Joint Agreement. Defendants announced their intention to eliminate five women's sports and at no point before announcing the elimination to the public did Brown reach out to Plaintiffs' class counsel to discuss the ramifications of this decision or try come to an agreement. Plaintiffs ask the Court to enforce the Joint Agreement and prevent Defendants from depriving the women at Brown of the rights they have under the Joint Agreement and Title IX.

Defendants knew that these eliminations would trigger the need to be within 2.25% participation gap under the Joint Agreement, as evidenced by notice to class counsel and President Paxson's statements that the school needed to ensure it remained in compliance. President Paxson went on to further acknowledge that reinstating the men's track, field, and cross county teams

would mean the university was not in compliance with the Joint Agreement. However, despite acknowledging these facts, Defendants moved forward with their decision to eliminate five women's teams and reinstate these men's teams.

Defendants are out of compliance with the Joint Agreement and offer nothing more than prospective promises of a varsity sailing program to try and argue that they are in compliance. Promises cannot take the place of concrete women's athlete participation opportunities under either the Joint Agreement or the law. The varsity sailing program does not exist and therefore cannot be the basis for compliance. Moreover, Defendants cannot be permitted to rely on projections which it itself premised on counting the same 25 women twice, especially where Brown considers the men's component of the team fully stocked at 10. While Plaintiffs are always in favor of adding athletic opportunities for women at Brown—especially since women continue to be the underrepresented gender at Brown even with a judgment in place requiring specific compliance with Title IX—these new prospective opportunities cannot come at the expense of established teams with women with the interest and ability to compete at the college level.

Plaintiffs file this motion for immediate relief because Brown's decision to eliminate the five women's varsity teams threatens to harm the teams in ways the Court would not be able to rectify with a later order of restoration, should Brown's plans not come to fruition. These harms include, among other injuries, loss of coaching staff (who may obtain other employment), cessation of recruiting activities (to maintain viable team participants), and removal of these teams from intercollegiate conference and post-season schedules (which may not be remediable once the schedules have been announced). Plaintiffs therefore seek expedited consideration of this motion, including re-assignment to a judge sitting in the District of Rhode Island, issuance of an order

prohibiting implementation of the announced team eliminations, expedited discovery, and a prompt hearing on Plaintiffs' motion.

Respectfully Submitted,

/s/ Lynette Labinger

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CERTIFICATION

I hereby certify that on June 29, 2020, a true copy of this document was delivered electronically using the CM/ECF system to all counsel of record and was further sent by email to the following counsel for defendants:

Robert C. Corrente (RCorrente@whelancorrente.com)
Eileen Goldgeier (eileen_goldgeier@brown.edu)
James Green (JMGreen@brown.edu)

/s/ Lynette Labinger
Lynette Labinger #1645

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

AMY COHEN, et. al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 92-0197-T
	)	
BROWN UNIVERSITY, VARTAN GREGORIAN and DAVID ROACH,	)	
	)	
Defendants.	)	

JOINT AGREEMENT

This Agreement is made between Plaintiffs and Defendants, Brown University, and E. Gordon Gee (successor to defendant Vartan Gregorian) and David Roach, each in their official capacity (collectively referred to as "Brown").

WHEREAS this matter is currently before the Court subject to the Court of Appeals for the First Circuit's Order reversing the District Court judgment in part and remanding to this Court for the purpose of Brown submitting its plan for compliance; and

WHEREAS Brown submitted a Proposed Compliance Plan to which Plaintiffs objected; and

WHEREAS Brown has developed an Amended Proposed Compliance Plan, a copy of which is attached hereto as Exhibit A, which sets forth the criteria and methodology utilized by Brown in formulating its plan to achieve compliance and the specific steps Brown currently intends to implement to achieve compliance; and

Exhibit A

WHEREAS plaintiffs have not agreed to or endorsed the criteria, methodology, or steps set forth in the Amended Proposed Compliance Plan attached hereto, but do not object to Brown's implementation of that Plan to the extent that it is consistent with the terms of this Agreement; and

WHEREAS the parties recognize that having the Court consider Brown's Amended Proposed Compliance Plan may result in uncertainty with respect to the outcome of such consideration; and

WHEREAS the parties have reached this Agreement, which will, if approved by the Court, eliminate the uncertainty inherent in further formal proceedings; and

WHEREAS, in light of the fact that this matter has been certified as a class action, the parties believe it is appropriate and necessary that the Court approve of any agreement between the parties and provide notice to the class of such proposal;

NOW THEREFORE, in consideration of the mutual premises and covenants contained herein, it is agreed as follows:

I. GENERAL PROVISIONS

A. This Agreement shall be binding on the parties hereto as well as their successors, as the case may be, only if approved by the Court as set forth herein, provided, however, that Brown shall implement the terms set forth herein during the pendency of the Court's consideration of the Joint Motion to Approve this Agreement.

B. This Agreement shall be without prejudice to either party's position with respect to attorney's fees and costs in connection with this litigation.

C. The parties shall jointly move to have the Court approve this Agreement and enter an appropriate Order.

D. This Agreement resolves all issues remaining in this suit except for attorneys' fees and costs.

E. This Agreement, if approved by the Court, is indefinite in duration as to those provisions concerning measurement of participation rates by applicable percentages (proportionality) and is not subject to revision or modification except as follows:

1. By agreement of the parties, approved by the Court in accordance with the provisions of Rule 23, Fed.R.Civ.P.;

2. After June 30, 2002, in the event of a determination by the Court, upon application for review by defendants or plaintiffs, that the United States Supreme Court, the First Circuit Court of Appeals, Congress, or the controlling regulatory agency has changed or clarified the law such that compliance with Title IX is not measured with reference to a comparison of the proportion of athletes of one gender and the undergraduate proportion of that gender, or that the proportion necessary to establish compliance with Title IX is significantly different (greater or lesser) than the percentage variances permitted by this Agreement.

F. Those provisions of this Agreement requiring Brown to take, or refrain from taking, specific actions within the period of 1998-99 through June 30, 2002,

shall not be affected by a change in the law as set forth above.

G. Nothing in this Agreement shall prevent members of the plaintiff class participating on university-funded teams from challenging the adequacy of Brown's treatment of women participants in its intercollegiate athletic program, even though on a program-wide basis, participation rates for men and women are within the applicable percentage of undergraduate enrollment of men and women for the subject academic year. Commencing July 1, 2001 (July 1, 2002 as to participants on women's gymnastics), nothing in this Agreement shall prevent members of the plaintiff class participating on donor-funded teams from challenging the adequacy of Brown's treatment of women participants in its intercollegiate athletic program, even though on a program-wide basis, participation rates for men and women are within the applicable percentage of undergraduate enrollment of men and women for the subject academic year.

H. Nothing in this Agreement shall be construed as requiring or permitting any Brown coach, administrator, staff member, or student athlete to violate any provision of NCAA legislation, Ivy League rules or other applicable rules or regulations.

II. BROWN'S INTERCOLLEGIATE ATHLETIC PROGRAM.

A. Brown's intercollegiate athletic program, as that term is used in this Agreement consists of teams which are "donor-funded" and teams which are "university-funded." Within those two terms, Brown offers teams for women,

men, and co-ed teams. Except as specifically provided herein, nothing in this Agreement is intended, nor should it be construed, to alter or to require Brown to alter, the attributes of donor-funded and/or university-funded teams.

B. University-funded teams for women. For the academic years 1998-99, 1999-2000 and 2000-2001, Brown will continue to offer the following university-funded teams for women:

1. basketball
2. crew (novice and varsity)
3. cross-country
4. field hockey
5. ice hockey
6. lacrosse
7. soccer
8. softball
9. squash
10. swimming and diving
11. tennis
12. track, including winter (indoor) and spring (outdoor) seasons
13. volleyball

C. University-funded teams for men. For the academic year 1998-99, Brown will continue to offer the following university-funded teams for men:

1. basketball
2. baseball
3. crew (freshman and varsity)
4. cross-country
5. football
6. ice hockey
7. lacrosse
8. soccer
9. swimming and diving
10. tennis
11. track, including winter (indoor) and spring (outdoor) seasons

12. wrestling

D. Donor-funded teams for women. During the academic years 1998-99, 1999-2000 and 2000-2001, Brown will offer the following donor-funded teams for women:

1. fencing
2. gymnastics
3. skiing
4. water polo

E. During the academic year 2001-2002, Brown's intercollegiate athletic program will continue to include donor-funded women's gymnastics.

F. Donor-funded teams for men. During the academic year 1998-99, Brown will continue to offer the following donor-funded teams for men:

1. fencing
2. squash
3. water polo

G. Donor-funded co-ed teams. During the academic years 1998-99, 1999-2000 and 2000-2001, Brown will continue to offer the following co-ed donor-funded teams (provided, however, that Brown may limit participation on these teams to women during the specified time if, in Brown's discretion, such limitation is advisable):

a. equestrian
b. golf

III. PERMITTED VARIANCE IN PARTICIPATION RATIOS (PROPORTIONALITY)

A. During the academic years 1998-1999, 1999-2000 and 2000-2001:

1. Brown shall provide participation opportunities in its intercollegiate

program (university-funded and donor-funded) so that the percentage of each gender participating in the program is within 3.50% of each gender's percentage in the undergraduate enrollment for the same academic year. In the event that Brown adds any men's intercollegiate athletic team, except as provided in subparagraphs 2 and 3 below, for that year and for each year thereafter, the percentage of each gender participating in Brown's intercollegiate athletic program shall be within 2.25% of each gender's percentage in the undergraduate enrollment for the same academic year.

2. Brown will not add any men's team at the university-funded level or change the status of any men's team to the university-funded status unless the following conditions are met:

   a. If Brown adds a men's team, or changes the status of a men's team to university-funded, Brown will at the same time, add (or change the status of) one or more women's teams to the university-funded level so as to provide a number of actual women participants on the newly established women's university-funded team(s) so that the ratio of women participants to men participants at the university-funded level at the time of the change (based upon the previous year's participation) is not less than the ratio of women participants to men participants at the university-funded level before the

changes. Satisfaction of this requirement may not be accomplished by increasing the number of women participating on university-funded teams for women existing before the addition/change.

b. If the classification of men's skiing, fencing or water polo is changed to university-funded status, the corresponding women's team will also be changed to university-funded status.

3. Brown will not add men's teams at the donor-funded level, except that Brown may, in its sole discretion, add a donor-funded team for men's skiing.

B. Through and including the end of academic year 2000-2001, Brown shall continue to recruit and otherwise use its best efforts to encourage participation of women on the women's and co-ed varsity teams provided for in this Agreement, and shall take no action intended to reduce the size of any women's team nor the number of women participating on any co-ed team identified above.

C. Unless the permitted variance in participation ratios is already 2.25%, commencing July 1, 2001, Brown shall continue to provide participation opportunities in its intercollegiate program (university-funded and donor-funded) so that the percentage of each gender participating in the program is within 3.50% of each gender's percentage in the undergraduate

enrollment for the same academic year. If, however, any of the events listed in subparagraph 1 through 4 below takes place, then for that year and for each year thereafter, the percentage of each gender participating in Brown's intercollegiate athletic program shall be within 2.25% of each gender's percentage in the undergraduate enrollment for the same academic year:

1. The elimination of intercollegiate athletic teams for women or of co-ed teams or the change of status of intercollegiate athletic teams for women or co-ed teams from the university-funded to the donor-funded level.

2. The replacement or substitution of existing intercollegiate athletic teams for women or co-ed teams at the university- or donor-funded level.

3. The creation of intercollegiate athletic teams for men at the university- or donor-funded level.

4. The change of intercollegiate athletic teams for men from the donor-funded to the university-funded level.

D. Commencing July 1, 2001, the following circumstances shall not trigger the 2.25% variance (proportionality):

1. The addition or creation of additional intercollegiate athletic varsity or junior varsity teams for women at the university- or donor-funded level.

2. The reclassification of men's skiing, fencing or water polo to

university-funded status, provided that the corresponding women's team will also be changed to university-funded status.

3. The creation of a men's skiing team at the donor-funded level.

E. In the event that, through no fault of Brown, intercollegiate competition is not available for any women's team whose continued existence is necessary to retain the 3.50% permitted percentage variance, then Brown may apply to the Court for leave to institute a new women's team in place of and at the same level as such team or to change the status of a women's team from donor-funded to university-funded status and, subject to the Court's determination, thereby seek to retain the permissible 3.50% variance.

F. Determination of participation ratios.

1. In determining the percentage of women and men participating in the overall intercollegiate athletic program, women and men student-athletes who participate on more than one intercollegiate athletic team will be counted separately for each team on which they participate, except that, for the purposes of counting under this Agreement (it being understood that Indoor and Outdoor Track are two separate team for NCAA, Ivy League and other purposes, and Brown will continue to report them as such), Indoor and Outdoor Track shall be counted as a single sport.

2. An individual shall be considered to be an intercollegiate varsity athletic participant if his or her name is included as an eligible athlete

on the squad list on the first day of competition of the subject academic year.

3. An individual shall be considered to be a intercollegiate varsity athletic participant if his or her name is included on the squad list as an active (or injured) participant on the last day of regular season competition of the subject academic year.

4. The percentage of women and men participating in the overall intercollegiate athletic program shall be determined based upon the average number of men and women derived in accordance with the two preceding paragraphs, that is, if there were 420 women on all teams as of the first day of their respective competitions and 410 women on the last day of competition of the respective teams, then the number of female athletes for purposes of the determination of relative percentage of male and female student athletes would be 415.

G. Nothing herein shall prevent or restrict Brown from adding or creating additional varsity or junior varsity teams for women at the university- or donor-funded level, or eliminating varsity or junior varsity teams for men or changing the status of varsity teams for men from the university-funded to the donor-funded level.

H. Brown, in order to achieve compliance with the above, may, but is not required to, impose minimum numbers of participants for varsity teams. In

addition, Brown retains the right to impose maximums on men's teams and/or eliminate any men's teams.

IV. FUNDING AND TREATMENT OF CERTAIN DONOR-FUNDED TEAMS

A. For the academic years 1998-99, 1999-2000 and 2000-2001 (and 2001-2002 for women's gymnastics) the following donor-funded teams shall have not less than the following budget allocations, with funding assurances as indicated in paragraph B below:

1. fencing (administered jointly for men and women): $25,000
2. women's gymnastics: $64,400
3. women's skiing: $23,079 (provided that this budget allocation shall not be utilized to relieve the budget obligations of men's club ski team presently provided for compensation of a coach jointly assigned to men's and women's skiing)
4. women's water polo: $25,000

B. Funding shall be assured by Brown for the teams and years specified above, up to and including any deficit which remains at the end of the year for each such team (but in no event beyond the budgeted amount), through any source Brown chooses, including donations solicited through or made through the Brown University Sports Foundation, according to the following schedule:

- 100% during the year 1998-99;

- 95% during the year 1999-2000; and
- 90% during the year 2000-2001.
- 90% during the year 2001-2002 as to women's gymnastics only

C. Notwithstanding the levels of funding assurance set forth herein, in the event that all other donor-funded teams receive a higher percentage of their budget for the applicable year than as stated above, each of the said teams shall also receive that higher percentage in that year.

D. Nothing contained herein shall be construed as relieving any student or employee of any obligation or responsibility under Brown's policies or procedure. Women's teams will cooperate in good faith in efforts for fundraising, but lack of success will not be the basis for elimination or reclassification of such team, nor shall the same relieve Brown of its financial obligations under this Agreement during the years specified in paragraph A above.

E. All women's donor-funded teams shall be subject to the same responsibilities and obligations and accorded the same benefits and treatment as other donor-funded teams, except that during the years 1998-1999, 1999-2000 and 2000-2001 and 2001-2002, women's gymnastics will receive the same benefits and treatment (other than financial provisions otherwise provided herein) as the team received in 1997-1998.

V. REPORTING AND ENFORCEMENT

A. Annual Report. Unless and until relieved of this obligation by the Court upon

motion, no later than August 1 of each year , Brown shall prepare and serve upon Plaintiffs' counsel an annual report with regard to its compliance with this Agreement for the academic year just being completed. The report need not be filed with the Court in the absence of a dispute. If Plaintiffs' counsel has any comment, objection or request for consideration with regard to the report, Plaintiffs' counsel shall provide Defendants' counsel with a written statement specifically setting forth such comment, objection or request for consideration within 30 days. Within 20 days thereafter, Defendants' counsel shall respond to Plaintiffs' counsel's comment, objection or request for consideration. If any differences are not resolved or settled within 15 days of Plaintiffs' receipt of Defendants' response, either party may seek review by or relief from the Court, provided, however that neither party may seek such review or relief without the parties first having met and conferred in an effort to resolve their differences. Thereafter, either party may request expedited hearings.

B. The report shall provide the following:

1. For the years 1998-99, 1999-2000, and 2000-2001, year-end budget and expenditure reports (university and all gift accounts, if any) showing total amounts budgeted and expended by line item for the women's skiing, women's water polo, women's fencing and women's gymnastics teams.

2. For the year 2001-2002, year-end budget and expenditure reports

(university and all gift accounts, if any) showing total amounts budgeted and expended by line item for the women's gymnastics team.

3. Copies of official Brown team rosters (squad lists) used to determine varsity eligibility under Brown, NCAA, Ivy and/or other intercollegiate conference eligibility requirements, which copies identify with specificity the individuals included as participants on the team as of the first competition and as of the last competition of the regular competitive schedule, as well as the dates of the first competition and last competition.

4. The last available NCAA sports sponsorship form completed by Brown.

5. A list identifying all intercollegiate athletic teams added or discontinued during the preceding academic year and identifying all intercollegiate athletic teams whose status has been changed from donor-funded to university-funded or from university-funded to donor-funded, and any teams which Brown plans to change in status for the following year.

6. The number of male and female full-time undergraduate students enrolled at Brown in the preceding year.

C. In the event that Brown fails to meet the applicable permitted variance in percentage ratios as set forth in this Agreement:

1. Brown shall notify counsel for the Plaintiff class no later than August 1 following the conclusion of the academic year of the failure.
2. Brown shall provide counsel for the Plaintiff class with its explanation, if any, for the failure to achieve the applicable percentage.
3. Brown shall provide counsel for the Plaintiff class with its proposal, including details concerning any mechanism for enforcement of requirements, as to how and by what date Brown proposes to remedy this failure.
4. The parties shall confer and attempt to achieve agreement as to the appropriate remedy within 30 days thereafter.
5. If the parties are able to agree, the terms of their agreement shall be reduced to writing and implemented, but their agreement need not be filed with the Court.
6. If the parties are unable to agree, the matter shall be presented to the Court for determination of the manner in which Brown shall thereafter come into compliance with the then applicable percentage variance.

D. Additional information. Brown will provide additional information reasonably requested by Plaintiffs' counsel regarding compliance with this Agreement.

E. Notwithstanding the foregoing, Plaintiffs may, in the case of an alleged gross violation of this Agreement, seek relief from the Court, provided that they have first notified Defendants of the alleged gross violation and spent a reasonable period of time meeting and conferring with Defendants in an

attempt to resolve the issue.

VI. Enforcement. This terms of this Agreement shall be subject to the full enforcement powers of the Court by appropriate order. The Court shall retain jurisdiction concerning interpretation, enforcement and compliance with this Agreement.

VII. Retaliation Prohibited. Brown agrees that there shall be no retaliation against any person for lawfully opposing practices believed to violate Title IX, for lawfully providing information, assistance or encouragement to plaintiffs or their counsel in connection with this lawsuit, or hereafter in lawfully assisting in efforts to enforce, determine or ensure compliance with the terms of this Agreement.

VIII. Class Notice. In accordance with Federal Rule of Civil Procedure 23(e), the parties will jointly move the Court to enter an order: (a) tentatively approving this Agreement and (b) providing for individual and publication notice to the class, the filing of objections, if any, to the Agreement, and the scheduling of a hearing to consider final approval of the Agreement. The parties will cooperate in identifying the members of the class and drafting the language of the class notice. Defendants will provide the notice to the class members in a form agreeable to Plaintiffs' counsel.

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ATTORNEYS FOR PLAINTIFFS

Approved:

_____ Date:_____
Ernest Torres, U.S.D.J.

Exhibit A

Ex. 17

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

AMY COHEN, et. al, Plaintiffs, v. BROWN UNIVERSITY, VARTAN GREGORIAN and DAVID ROACH, Defendants.	)	C.A. No. 92-0197-T

BROWN UNIVERSITY'S AMENDED PROPOSED COMPLIANCE PLAN[1]

I. INTRODUCTION

This Compliance Plan is submitted by Brown University in accordance with the Mandate of the Court of Appeals for the First Circuit and the Order of the District Court entered February 24, 1997.

BROWN'S CRITERIA

The Compliance Plan is fashioned with consideration for the longstanding guiding principles which Brown has incorporated in its athletics programs, and these principles represent Brown's institutional preferences and priorities, which include the following:

- Since Brown's current lineup of intercollegiate teams is principally the result of historical development of teams based upon student interest and ability, and reflects investment of University resources, development of donor support and fosters strong alumni loyalty and support, it is Brown's desire to avoid eliminating any existing teams which continue to meet the minimum requirements for operation within the University's priorities.

1 This Amended Proposed Compliance Plan is submitted only in conjunction with, and subject to approval of, the Joint Agreement which is filed simultaneously with this document. This Amended Proposed Compliance Plan addresses major concerns of the Plaintiffs regarding viability of Donor-funded teams and a major concern of the Defendants regarding proportionality.

- Offer the maximum number of opportunities to participate in intercollegiate competition within the practical limits of facilities and budgets and with regard to the availability of competition within the Ivy League and within practical geographic limits.

- Add no additional sports which would further distress already overtaxed facilities, taking into consideration the intramural, physical education and recreational needs of the entire University Community.

- Attempt to maintain matched sports in the same funding category if possible.

- In light of the number of intercollegiate teams currently offered, which are approximately double the national average, comply with Court requirements through Prong One or Prong Two[2] to the extent possible.

- Offer new intercollegiate competition only to those teams which demonstrate increasing interest, sustained and sustainable ability to attract suitable numbers of athletes, demonstrated fundraising abilities, and appropriate competitive opportunities.

- Given the expense of maintaining University-funded status, those teams which repeatedly fail to achieve minimum team sizes will be reclassified to Donor-funded status until such time as they reestablish stability at a level justifying University-funded status. Donor-funded teams which are unable to achieve participation within minimums or fundraising ability will be subject to reclassification as Club teams.

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[2] As both the District Court and the Court of Appeals have noted, Brown's program was marked by explosive growth in women's sports in the 1970's, which made the Court's interpretation of Prong Two as requiring continuous, slow growth impractical for Brown and inconsistent with Brown's commitment to women's sports.

Nevertheless, the number of women participating in Brown's intercollegiate athletics has continued to grow as existing women's teams attract greater numbers of athletes. This growth is a positive reflection on Brown's commitment to women's athletics as it affects Brown's ability to attract, through recruited and non-recruited athletes, greater numbers of participants on existing teams.

Ironically, Brown's commitment to women, in such programs as the WISE (Women In Science And Engineering) program, which specifically seeks to increase women's participation in those studies, as well as the attractiveness of the entire Brown experience to women, have combined to increase the undergraduate percentage of women, with the result that Brown is now forced to mirror that growth in its intercollegiate athletics program.

Brown is desirous of submitting a plan of its own devise which is both satisfactory to the Court and consistent with Brown's academic freedom, within its economic limitations and consistent with its own priorities, academic and athletic.[3]

THE COURT'S CRITERIA

This Compliance Plan seeks to achieve compliance with the District Court's March 29, 1995 decision, reported at 879 F.Supp. 185(D.R.I. 1995), within the guidelines set forth in the District Court's August 17, 1995. The District Court's findings include:

- "Brown may achieve compliance ... [by] demot[ing] or eliminat[ing] the requisite number of men's positions...." March 29, 1995 Opinion, p. 67.
- Title IX compliance can be achieved by a program where "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." (Quoting Prong One).
- Under the District Court's Prong One analysis, the ratio of male and female student-athletes must "mirror[] the student enrollment as closely as possible." March 29, 1995 Opinion, at 37.

II. OVERVIEW OF COMPLIANCE PLAN

Through a combination of significant and substantial increases in the intercollegiate participation of women at Brown, as noted in Brown's evidence and Post-Hearing Memorandum, and experience in imposing maximum squad sizes on men's teams, Brown has determined that, under the conditions stated in this Plan, and within the requirements imposed by the Court, Prong One compliance remains possible without having to entirely eliminate men's teams or having to create additional University-funded varsity teams.

The Compliance Plan achieves compliance with Prong One by:

---

[3] Brown has consistently expressed, and continues to express that limitations on facilities and funds make it impractical and inconsistent with Brown's overall priorities to create new varsity teams as the University-funded level.

- eliminating men's positions without eliminating any men's teams.
- enforcing team minimums and maximums to stabilize relative proportions of men and women.
- creating additional women's intercollegiate opportunities consistent with both the District Court's analysis and Brown's physical and budgetary limitations. This Compliance Plan offers Brown's students, athletes and non-athletes, the broadest possible educational/athletic offering and retains continuity in Brown's sports program and its tradition of offering the broadest possible range of sports within the limits of facility and budgetary constraints.[4]

The Compliance Plan results in intercollegiate participation on University-Funded and Donor-Funded teams which result in each gender's percentage participation in varsity athletics being within a specified percentage, as discussed infra, of that gender's percentage within the undergraduate student population as a whole.

COMPLIANCE PLAN METHODOLOGY

The Compliance Plan uses the following methodology:[5]

Step 1: Count the number of women who participated in a given academic year on Varsity teams, using the following methodology:[6]

1. In determining the percentage of women and men participating in the overall intercollegiate athletic program, women and men student-athletes who participate on more than one intercollegiate athletic team will be counted separately for each team on which they participate, except that, for the purposes of counting under this Plan

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[4] In this respect, Brown has maintained, and continues to maintain, that its facilities, while clearly outstanding, are severely strained given the demands of recreational, physical education, intramural, club and varsity programs. Under these circumstances, Brown has virtually nowhere left to grow, with the exception of specialized, exclusive use facilities, such as the Marston Boathouse, which are not subject to competing demands.

[5] The chosen methodology lends itself to annual recalculation, and Brown anticipates that it will be employed annually in order to maintain compliance with the District Court's analysis of Prong One so long as Brown remains bound by that analysis.

[6] Brown will continue to promulgate and enforce rules which will ensure that Women's teams attract and support athletes. These minimum requirements are consistent with proven past capacity of women's teams, barring circumstances justifying such increased minimums.

(it being understood that Indoor and Outdoor Track are two separate team for NCAA, Ivy League and other purposes, and Brown will continue to report them as such), Indoor and Outdoor Track shall be counted as a single sport.

2. An individual shall be considered to be an intercollegiate varsity athletic participant if his or her name is included as an eligible athlete on the squad list on the first day of competition of the subject academic year.

3. An individual shall be considered to be a intercollegiate varsity athletic participant if his or her name is included on the squad list as an active (or injured) participant on the last day of regular season competition of the subject academic year.

4. The percentage of women and men participating in the overall intercollegiate athletic program shall be determined based upon the average number of men and women derived in accordance with the two preceding paragraphs, that is, if there were 420 women on all teams as of the first day of their respective competitions and 410 women on the last day of competition of the respective teams, then the number of female athletes for purposes of the determination of relative percentage of male and female student athletes would be 415.

Step 2: Ascertain whether there is any reasonable basis to conclude that those participation numbers will differ significantly in the next academic year, and, if so, adjust the number derived in Step One;

Step 3: Calculate ratio of men to women in current academic year's undergraduate student body;

Step 4: Determine number of athletes of each gender which will result in gender ratio of student-athletes being exactly proportionate to undergraduate student body ratio, according to the following formula:

$$\frac{\text{\# of female athletes}}{\text{\# of male athletes}} = \frac{\text{\% of female undergraduates}}{\text{\% of male undergraduates}}$$

In applying the formula, where one gender has, under this Plan, been subject to maximum roster sizes, all values except the number of athletes of that gender are known, and the formula is solved to render the number of athletes of that gender which would achieve exact proportionality; and

Step 5: The number of athletes permitted of any gender subject to maximum roster sizes in the preceding year is allocated among those teams which Brown determines it will field in the following academic year, giving consideration to the needs of each team, as they may be

determined to exist by Brown, as well as reasonable expectations concerning the number of athletes of that gender expected to seek to participate on such teams such that the relative participation ratios for men and women may reasonably be expected to be within the percentage variance set forth in the Plan. The maximums derived under the Plan, if any, shall reflect, to the extent feasible in Brown's judgment, the selection of existing sports, the interest historically shown in those sports and the desire to offer athletic opportunity to student-athletes to the maximum extent possible within the limits set by the Court. The maximum derived herein shall be enforced as of the first day of competition. In the event that participation as of the first day of competition is or is reasonably expected to be substantially different than expected for either gender under this Plan, adjustments to maximums may be made for the purpose of either permitting increased participation for either gender or decreasing participation for either gender so as to maintain gender proportions within the limits set forth in this Plan.

III. APPLICATION OF COMPLIANCE PLAN

Step One: Following are 1997-1998 actual female participation figures as calculated from Squad Lists on the first day of competition and 1997-1998 minimums:

WOMEN'S 1997-1998 PARTICIPATION		**WOMEN'S 1997-1998 MINIMUMS**	
University-funded		University-funded	
Basketball:	14	Basketball:	16
Crew:	57	Crew:	55
Cross-Country:	26	Cross-Country:	25
Field Hockey:	32	Field Hockey:	36
Gymnastics:	18	Gymnastics:	16
Ice Hockey:	19	Ice Hockey:	22
Lacrosse:	29	Lacrosse:	32
Soccer:	27	Soccer:	26
Softball:	17	Softball:	20
Squash:	17	Squash:	17
Swimming:	28	Swimming:	28
Tennis:	11	Tennis:	11
Track:	53	Track:	50
Volleyball:	26	Volleyball:	18
Donor-funded		Donor-funded	
Equestrian:	27	Equestrian:	26
Fencing:	15	Fencing:	15
Skiing:	15	Skiing:	15
Golf:	8	Golf:	5
Total women varsity:	**439**		

Step Two: The anticipated participation for women in the 1998-1999 academic year is expected to differ from the 1997-1998 participation in the following respects:

- Women's Lightweight Crew was added as a Varsity division to the Women's Crew Team. This is an emerging sport which offers the opportunity for new athletes to compete at the varsity level in regular season competition. Based upon the needs of a team, the experience Brown has in recruiting women's Crew teams, the experience Brown has had in recruiting for a Lightweight Division during the 1997-1998 year, the experience of other institutions which have sponsored Women's Lightweight Crew teams, expected participation in this division for 1998-1999 is 15 women;

- Women's Water Polo will be changed to a Donor-Funded Varsity team. Participation is expected to be at least 16 women;

- Given the stringent requirement that participation numbers be within the variance set forth in this Plan, minimum and maximum participation numbers will be strictly enforced during the entire season. Based upon previous experience, it is clear that many coaches are able to exceed their minimums. However, certain coaches have failed to meet their minimums for reasons beyond the control of the University. Therefore, minimum roster sizes will be adjusted/imposed (subject to modification at Brown's discretion if circumstances warrant) and enforced as follows:

1998-1999 MINIMUM ROSTER SIZES FOR WOMEN'S TEAMS

University-funded

Basketball:	16
Crew (incl. L/W):	60
Cross-Country:	25
Field Hockey:	36
Ice Hockey:	22
Lacrosse:	32
Soccer:	26
Softball:	20
Squash:	17
Swimming:	28
Tennis:	11
Track:	50
Volleyball:	18

Donor-funded

Equestrian:	26
Fencing:	15
Gymnastics:	16
Skiing:	15
Water Polo:	16
Golf:	5
Minimum women varsity:	**454**

- Experience during 1997-1998 reveals that minimums for women may not be met in every case, but that, overall, female participation will meet the total of the minimums. In 1997-1998, the total of women's minimums was 438 (which did not include Women's Water Polo), and the participation on those teams was 439.

- Given the strict limits under this Plan, minimums will be strictly enforced under this Compliance Plan during the entire season.

- Anticipated participation for any gender in a given year will consider the experience of the previous year as well as reasonably anticipated factors which may affect such anticipated participation. For purposes of this Compliance Plan, Brown assumes that the number of women athletes participating in excess of the minimums will be the same (although not necessarily on the same teams) as the number of actual participants in the previous year unless circumstances exist which make such expectation unreasonable.

Step Three: According to figures obtained from the Registrar, the undergraduate student body gender ratio for the 1997-1998 academic year was 46.70% male and 53.30% female.

Step Four: Apply formula:

$$\frac{\text{\# of female athletes}}{\text{\# of male athletes}} = \frac{\text{\% of female undergraduates}}{\text{\% of male undergraduates}}$$

which is calculated as follows:

$$\frac{455}{\text{\# of male athletes}} = \frac{53.30}{46.70}$$

and renders the following: # of male athletes = 399, which is the number of male athletes which would result in exact proportionality.

Step Five: Brown imposes the following maximum and minimum roster sizes on men's teams:[7]

[7] Because the Women's and Men's Track teams share coaching, and because the Coach would, permit essentially unlimited membership, the maximum number of men will be increased by one man for each two women by which the Women's Track team exceeds its minimum. This would apply to (continued...)

MEN'S MAXIMUMS		MEN'S MINIMUMS	
University-Funded		University-Funded	
Baseball:	26	Baseball:	20
Basketball:	16	Basketball:	14
Crew:	46	Crew:	45
Cross-Country:	20	Cross-Country:	18
Football:	99	Football:	85
Ice Hockey:	33	Ice Hockey:	25
Lacrosse:	39	Lacrosse:	32
Soccer:	26	Soccer:	24
Swimming:	22	Swimming:	16
Tennis:	10	Tennis:	9
Track:	50	Track:	40
Wrestling:	30	Wrestling:	20
Donor-funded		Donor-funded	
Equestrian	2	Equestrian	0
Fencing:	15	Fencing:	10
Golf:	10	Golf:	5
Squash:	10	Squash:	8
Water Polo:	16	Water Polo:	14
Maximum men varsity:	**470**	**Minimum men varsity:**	**385**

- Experience during the 1996-1997 and 1997-1998 academic year with the application of team maximums reveals that, program-wide, it can be anticipated that the total number of participants will be less than the total maximum number of athletes permitted, but it cannot be anticipated on which specific teams those shortfalls will occur. For example, in 1996-1997, while the maximum number of Men's University-Funded Athletes was 417,[8] the actual participation number on those teams was 384, which renders an expected participation rate of not more than 92.1% of total

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(...continued)
both Cross-country and Indoor/Outdoor Track. A similar rule would apply to Men's Fencing and Swimming, which also share coaching with the matched Women's teams.

8 Men's Cross-country' 1996-1997 maximum was increased to 22 based upon increased women's participation.

permitted maximums. In 1997-98, the total maximum permitted was 468, and actual participation was 419, or 89.5% of total permitted maximums.

- Based upon this experience, Brown assumes that the percentage of men participating in 1998-1999 will be 92.5% of 470, or 435.

Assuming a program which has 435 male participants and 455 women, the relative percentages of men and women would be 48.9% male and 51.1% female. The 1997-1998 undergraduate population, as noted above, was 46.2% male to 53.8% female ratio of the undergraduate student body.

IV. BROWN'S INTERCOLLEGIATE ATHLETIC PROGRAM.

A. Brown's intercollegiate athletic program consists of teams which are "donor-funded" and teams which are "university-funded." Within those two terms, Brown offers teams for women, men, and co-ed teams.

B. University-funded teams for women. For the academic years 1998-99, 1999-2000 and 2000-2001, Brown will continue to offer the following university-funded teams for women:

1. basketball
2. crew (novice and varsity)
3. cross-country
4. field hockey
5. ice hockey
6. lacrosse
7. soccer
8. softball
9. squash
10. swimming and diving
11. tennis
12. track, including winter (indoor) and spring (outdoor) seasons
13. volleyball

C. University-funded teams for men. For the academic year 1998-99, Brown will continue to offer the following university-funded teams for men:

1. basketball
2. baseball
3. crew (freshman and varsity)
4. cross-country
5. football

6. ice hockey
7. lacrosse
8. soccer
9. swimming and diving
10. tennis
11. track, including winter (indoor) and spring (outdoor) seasons
12. wrestling

D. Donor-funded teams for women. During the academic years 1998-99, 1999-2000 and 2000-2001, Brown will offer the following donor-funded teams for women:

1. fencing
2. gymnastics
3. skiing
4. water polo

E. During the academic year 2001-2002, Brown's intercollegiate athletic program will continue to include donor-funded women's gymnastics.

F. Donor-funded teams for men. During the academic year 1998-99, Brown will continue to offer the following donor-funded teams for men:

1. fencing
2. squash
3. water polo

G. Donor-funded co-ed teams. During the academic years 1998-99, 1999-2000 and 2000-2001, Brown will continue to offer the following co-ed donor-funded teams (provided, however, that Brown may limit participation on these teams to women during the specified time if, in Brown's discretion, such limitation is advisable):

1. equestrian
2. golf

V. PERMITTED VARIANCE IN PARTICIPATION RATIOS (PROPORTIONALITY)

A. During the academic years 1998-1999, 1999-2000 and 2000-2001:

1. Brown shall provide participation opportunities in its intercollegiate program (university-funded and donor-funded) so that the percentage of each gender participating in the program is within 3.50% of each gender's percentage in the undergraduate enrollment for the same academic year. In the event that Brown adds any men's intercollegiate athletic team, except as provided in

subparagraphs 2 and 3 below, for that year and for each year thereafter, the percentage of each gender participating in Brown's intercollegiate athletic program shall be within 2.25% of each gender's percentage in the undergraduate enrollment for the same academic year.

2. Brown will not add any men's team at the university-funded level or change the status of any men's team to the university-funded status unless the following conditions are met:

   a. If Brown adds a men's team, or changes the status of a men's team to university-funded, Brown will at the same time, add (or change the status of) one or more women's teams to the university-funded level so as to provide a number of actual women participants on the newly established women's university-funded team(s) so that the ratio of women participants to men participants at the university-funded level at the time of the change (based upon the previous year's participation) is not less than the ratio of women participants to men participants at the university-funded level before the changes. Satisfaction of this requirement may not be accomplished by increasing the number of women participating on university-funded teams for women existing before the addition/change.

   b. If the classification of men's skiing, fencing or water polo is changed to university-funded status, the corresponding women's team will also be changed to university-funded status.

3. Brown will not add men's teams at the donor-funded level, except that Brown may, in its sole discretion, add a donor-funded team for men's skiing.

B. Through and including the end of academic year 2000-2001, Brown shall continue to recruit and otherwise use its best efforts to encourage participation of women on the women's and co-ed varsity teams provided for in this Plan, and shall take no action intended to reduce the size of any women's team nor the number of women participating on any co-ed team identified above.

C. Unless the permitted variance in participation ratios is already 2.25%, commencing July 1, 2001, Brown shall continue to provide participation opportunities in its intercollegiate program (university-funded and donor-funded) so that the percentage of each gender participating in the program is within 3.50% of each gender's percentage in the undergraduate enrollment for the same academic year. If, however, any of the events listed in subparagraph 1 through 4 below takes place, then for that year and for each year thereafter, the percentage of each gender participating in

Brown's intercollegiate athletic program shall be within 2.25% of each gender's percentage in the undergraduate enrollment for the same academic year:

1. The elimination of intercollegiate athletic teams for women or of co-ed teams or the change of status of intercollegiate athletic teams for women or co-ed teams from the university-funded to the donor-funded level.

2. The replacement or substitution of existing intercollegiate athletic teams for women or co-ed teams at the university- or donor-funded level.

3. The creation of intercollegiate athletic teams for men at the university- or donor-funded level.

4. The change of intercollegiate athletic teams for men from the donor-funded to the university-funded level.

D. Commencing July 1, 2001, the following circumstances shall not trigger the 2.25% variance (proportionality):

1. The addition or creation of additional intercollegiate athletic varsity or junior varsity teams for women at the university- or donor-funded level.

2. The reclassification of men's skiing, fencing or water polo to university-funded status, provided that the corresponding women's team will also be changed to university-funded status.

3. The creation of a men's skiing team at the donor-funded level.

VI. FUNDING AND TREATMENT OF CERTAIN DONOR-FUNDED TEAMS

A. For the academic years 1998-99, 1999-2000 and 2000-2001 (and 2001-2002 for women's gymnastics) the following donor-funded teams shall have not less than the following budget allocations, with funding assurances as indicated in paragraph B below:

1. fencing (administered jointly for men and women): $25,000
2. women's gymnastics: $64,400
3. women's skiing: $23,079 (provided that this budget allocation shall not be utilized to relieve the budget obligations of men's club ski team presently provided for compensation of a coach jointly assigned to men's and women's skiing)
4. women's water polo: $25,000

B. Funding shall be assured by Brown for the teams and years specified above, up to and including any deficit which remains at the end of the year for each such team (but in no event beyond the budgeted amount), through any source Brown chooses, including donations solicited through or made through the Brown University Sports Foundation, according to the following schedule:

- 100% during the year 1998-99;
- 95% during the year 1999-2000; and
- 90% during the year 2000-2001.
- 90% during the year 2001-2002 as to women's gymnastics only

C. Notwithstanding the levels of funding assurance set forth herein, in the event that all other donor-funded teams receive a higher percentage of their budget for the applicable year than as stated above, each of the said teams shall also receive that higher percentage in that year.

D. Nothing contained herein shall be construed as relieving any student or employee of any obligation or responsibility under Brown's policies or procedure. Women's teams will cooperate in good faith in efforts for fundraising, but lack of success will not be the basis for elimination or reclassification of such team, nor shall the same relieve Brown of its financial obligations under this Plan during the years specified in paragraph A above.

E. All women's donor-funded teams shall be subject to the same responsibilities and obligations and accorded the same benefits and treatment as other donor-funded teams, except that during the years 1998-1999, 1999-2000 and 2000-2001 and 2001-2002, women's gymnastics will receive the same benefits and treatment (other than financial provisions otherwise provided herein) as the team received in 1997-1998.

IV. CONCLUDING REMARKS

Brown has exerted its best good faith efforts to propose a Compliance Plan which comports with the District Court's analysis. It has never been Brown's desire to deny opportunities to any student-athlete with the ability and interest to compete intercollegiately. In fact, the genesis of this suit was Brown's decision, based upon budgetary constraints, to change the funding status of four teams, two men's and two women's, without eliminating the opportunity for Brown students to compete in the affected sports.

The Compliance Plan is as consistent with that philosophy as Brown believes that the District Court's analysis permits. Brown takes no comfort in proposing this Compliance Plan, which denies participation to many interested and able student-athletes, but, as between the 'rock' of the District Court's analysis and the 'hard place' of the financial reality of running a University, Brown has proposed a plan which, among distasteful alternatives, is the least distasteful.

Respectfully submitted,
Brown University, by its attorneys,

Date: 6/23/98

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing document to be mailed, by first class mail, postage prepaid, to the following attorneys of record on the 23 day of June, 1998:

Lynette Labinger
Roney & Labinger
344 Wickenden Street
Providence, RI 02903

Amato A. DeLuca
DeLuca & Weizenbaum
36 Exchange Terrace
Providence, RI 02903

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

v.

BROWN UNIVERSITY, et al.,
Defendants

C.A. No. 92-197-T

JUDGMENT

This matter came on for hearing on October 8, 1998, before the Hon. Ernest Torres, United States District Judge, on the joint motion of the parties' to give final approval to the Joint Agreement of the parties preliminarily approved on June 23, 1998, and after having given notice to the plaintiff class and opportunity to submit objections or otherwise be heard, it is hereby

O R D E R E D:

1. The Court approves the Joint Agreement of the parties of June 23, 1998 and enters the same as the Order of the Court in accordance with the provisions set forth therein.

2. In accordance with Rule 54(d)(1) and (d)(2)(B), Fed.R.Civ.P., the Court extends the time for filing of any further motion for the award of attorneys' fees or application for costs by plaintiffs, and directs the following schedule to determine plaintiffs' previously filed and outstanding requests for the award of attorneys' fees and costs: if the parties are unable to resolve the issue by November 8, 1998, then plaintiffs shall

have to and including December 8, 1998 within which to file a preliminary request for the award of attorneys' fees and costs, to include any further or supplemental motion, a statement of the amounts sought and a brief summary of the basis therefor; and plaintiffs shall have to and including January 11, 1999 within which to file affidavits, memorandum and other materials in support of plaintiffs' application for the award of attorneys' fees and costs.

ENTERED as the Order of the Court this 15th day of October, 1998.

By Order,

Clerk

Enter: Ernest C Torres
U.S. District Judge

CERTIFICATION

I hereby certify that I caused the within document to be served by telecopier upon Julius C. and Jeffrey Michaelson, Michaelson & Michaelson, 321 South Main Street, Providence, RI 02903; and Beverly E. Ledbetter, Brown University, 103 University Hall, Providence, RI 02912 on this the 8th day of October, 1998.

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Exhibit A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

AMY COHEN, et. al, each Individually and on Behalf of all Others Similarly Situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 92-0197 P
BROWN UNIVERSITY, VARTAN GREGORIAN, and DAVID ROACH,	)	
Defendants.	)	

ORDER

In Cohen v. Brown University, 879 F.Supp. 185 (D.R.I. 1995) this Court found that Brown's varsity athletic program violates Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1988) ("Title IX"). I subsequently ordered the defendants to "submit to this Court for approval a comprehensive plan for compliance with Title IX. . . ." Modified Order, May 4, 1995 at 4. Presently before this Court is the defendants' proposed compliance plan. Having found that the plan is not comprehensive in scope and that it fails to comply with this Court's Order, I now reject the defendants' plan and order specific relief in its place.

I.

The requirements of Title IX are set forth in exhaustive detail in Cohen, 879 F.Supp. 185.[1] In the interest of providing a

[1] The Opinion and Order of March 29, 1995 addressed a number of points raised by defendants in their Memorandum in Response to Plaintiffs' Objection to Compliance Plan. I am dismayed to find arguments presented as if they were novel and heretofore not

clear record, I will briefly summarize the findings of fact and conclusions of law presented in that Opinion.

Title IX is given specific meaning by the Department of Education's Office of Civil Rights' regulations and Policy Interpretation. The trial and subsequent Opinion and Order of March 29, 1995 focused on whether Brown's athletic program met the requirements of the Policy Interpretation's three prong test.

Brown University's two-tiered varsity athletic program[2] (i.e., university-funded and donor-funded varsities) failed to satisfy any prong of the Policy Interpretation's three prong test. Prong One: This Court concluded that "intercollegiate level participation opportunities for male and female students" are not "provided in numbers substantially proportionate to their respective enrollments" at Brown. Cohen, 879 F.Supp. at 200 (citing 44 Fed.Reg. at 71,418). From the NCAA squad lists maintained by Brown, I determined that Brown provides 555 (61.87%) intercollegiate athletic opportunities to men but provides only 342 (38.13%) to women. The student body consists of 2796 (48.86%) men and 2926 (51.14%) women. Because Brown maintains a 13.01% disparity between female participation in intercollegiate athletics

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considered by the Court when in fact they were explicitly discussed in the Opinion. For example, defendants suggest that if this Court were truly interested in counting "intercollegiate opportunities" as defined by the Office of Civil Rights, it would include at least three women's club teams. However, as I specifically detailed in Cohen, 879 F.Supp. at 200 n.29, this position is untenable.

[2] For a discussion of the structure of Brown's intercollegiate program and the differences between university-funded and donor-funded varsities, see Cohen, 879 F.Supp. at 189.

and female student enrollment, the gender balance of Brown's varsity program (including both university-funded varsities and donor-funded varsities) does not substantially mirror the gender balance of Brown's student body. On the contrary, men enjoy a disproportionate share of the varsity athletic positions afforded to Brown University students. Rather than reiterate the discussion of prong one contained in the Opinion and Order of March 29, 1995, I call the reader's attention to Cohen, 879 F.Supp. at 199-207, 211.

Prong Two: Defendants failed to demonstrate that Brown has maintained a history and continuing practice of intercollegiate program expansion for women, the underrepresented sex. Thus, defendants' intercollegiate athletic program does not satisfy prong two. For a more detailed analysis of this facet of the Policy Interpretation, see Cohen, 879 F.Supp. at 207, 211.

Prong Three: Finally, I determined that Brown's current athletic program, which favors its male students, is not justified under Title IX by prong three. See Cohen, 879 F.Supp. at 207-209, 211-213. A university can comply with the third prong by "fully and effectively" meeting the athletic interest and ability of the underrepresented sex. As noted in Cohen, 879 F.Supp. at 212-13, the potential for athletic development and the level of competition of women's club and donor-funded teams are much less than that of university-funded teams.[3] The weight of the evidence at trial

[3] I recognize that there appears to be a contradiction in counting donor-funded teams as providing "intercollegiate" participation opportunities for the purposes of prong one, while

conclusively demonstrated that four established women's teams (donor-funded gymnastics, skiing, fencing and club water polo), presently excluded from university-funded varsity status by Brown, are capable of competing at Brown's highest varsity level. Therefore, Brown has not "fully and effectively accommodated" the underrepresented sex in its intercollegiate program.

To comply with the Opinion and Order of March 29, 1995 and the Modified Order of May 4, 1995, Brown submitted a proposed plan. The defendants' plan, however, is deficient in a number of respects and cannot be accepted by this Court.

II.

Brown states that its plan is designed to provide "substantially proportionate participation opportunities" (prong one) at the university-funded varsity level. Brown proposes to achieve this goal in two phases. In Phase I, defendants propose to use three different methods to reduce the number of men and

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finding that such teams do not satisfy the "full and effective" accommodation standard of prong three. However, because of the distinct purposes served by each prong and the unique character of Brown's two-tiered athletic program, donor-funded teams properly play different roles in prong one and prong three analyses. See Cohen, 879 F.Supp. at 212-13.

Brown has chosen to create a bifurcated varsity program, rendering policy interpretation analysis more complicated than in most Title IX "equal opportunity" cases. However:

> Brown's restructured athletic program cannot be used to shield it from liability when in truth and in fact it does not fully and effectively accommodate the women athletes participating on donor-funded teams. It would circumvent the spirit and meaning of the Policy Interpretation if a university could "fully and effectively" accommodate the underrepresented sex by creating a second-class varsity status.

Cohen, 879 F.Supp. at 213.

increase the number of women participating in varsity athletics. Implementation of the plan would reduce the number of men participating in varsity athletics by limiting squad sizes on men's teams only.[4] Execution of the defendants' plan purports to increase the number of women participating in varsity athletics by (1) requiring all head coaches to field squads that meet minimum size requirements set by the athletic department, irrespective of the actual needs of the team (this condition will primarily affect the women's programs); and (2) adding new junior varsity teams to the women's basketball, lacrosse, soccer, and tennis programs.

In the event that the Court finds this part of the plan (Phase I) insufficient to achieve substantial proportionality under prong one, defendants additionally propose, in Phase II, to eliminate men's teams in order to reach substantial proportionality under prong one.

Defendants' Phase I is fatally flawed in two respects. First, it purports to achieve compliance with prong one (substantial proportionality), but in doing so it disregards donor-funded varsity teams. Because 76 men participated on donor-funded varsities while only 30 women participated on donor-funded varsities, men constitute an even greater percentage of the donor-funded athletes (71.7%) than they do of the university-funded athletes (60.56%). Thus, simply by ignoring all donor-funded varsity programs, defendants improve their total female varsity

[4] Brown intends to enforce this policy by having the athletic director strike names from a coach's roster if team size exceeds the maximum limit set forth in the compliance plan.

participation numbers from 38.13% (when both tiers are included) to 39.44% (when only university-funded varsities are included).

The defendants' plan thus disregards the Opinion and Order, which manifestly held that the donor-funded varsity teams, as established at Brown, do qualify under the Policy Interpretation's definition of "intercollegiate competition" even though they are maintained at inferior levels of support and competition. The plan presented by defendants must be rejected; any genuine plan for compliance would, at the very least, address participation in the entire intercollegiate program -- including both varsity tiers.

Second, and more significantly, the proposed plan artificially boosts women's varsity numbers by adding junior varsity positions on four women's teams. Positions on distinct junior varsity squads do not qualify as "intercollegiate competition" opportunities under the Policy Interpretation and should not be included in defendants' plan. As noted in Cohen, 879 F.Supp. at 200, "intercollegiate" teams are those that "regularly participate in varsity competition." See 44 Fed.Reg. at 71,413 n.1. Junior varsity squads, by definition, do not meet this criterion. Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.[5] Attempting to pad the women's varsity participation

[5] Although Brown has attempted to characterize its proposed creation of junior varsity positions as additions to the varsity teams, this Court cannot accept such representations. These new

numbers in this way indicates a regrettable lack of interest in providing an intercollegiate athletic experience for its female students that is equivalent to that provided to its male students.[6]

Contrary to Brown's representations, see Mem. in Resp. to Pls.' Obj. to Compliance Plan at 7-9, men's separate junior varsity

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positions would, in some cases, double the teams' effective maximums (as revealed in coaches' sworn testimony at trial). Defendants argue that this Court must count new women's junior varsity positions as varsity opportunities because the Opinion and Order of March 29, 1995 counted even varsity "benchwarmers" as varsity participants. I remind the defendants that the Opinion deferred to the judgment of the students and coaches that all members of varsity teams, as demonstrated by their very membership, enjoyed worthwhile varsity experiences. Now, however, the University seeks to override the judgment of the coaches and students as to how many worthwhile varsity experiences may be enjoyed on a team without impairing the team's level of competition. The University cannot achieve compliance merely by flooding women's teams with members in excess of the coaches' limits, maintaining that the capacity on women's teams is whatever the University says it is.

[6] Defendants suggest that if this Court rejects the new junior varsity positions because they unrealistically inflate the women's varsity rosters, then the Court must also reduce its calculation of men's varsity participation numbers. Defendants ask:

> Where better to apply that politically charged appellation ["massively overstocked"] than the bloated roster of men's track, which has been as high as 75? Or Ice Hockey, which has carried as many as 50 players? Or, most "massively overstocked" of all, Football, which has carried as many as 147 players?

Mem. in Resp. to Pls.' Obj. to Compliance Plan at 10-11. Defendants conveniently overlook the fact that the size of these men's teams was set by the coaches' personal preferences--no more players were retained on these teams than were welcomed by the coaches. Furthermore, defendants' position that these teams were unnecessarily and unrealistically large directly contradicts the very arguments they presented at trial. For example, Brown vociferously defended the size of the football team, justifying its numbers by pointing to the special nature of the sport: the high rate of injury, the substantial number of specialized positions, and the need to scrimmage in practice. To now suggest that these large numbers render the team "massively overstocked" is disingenuous. See also supra note 5.

teams were not counted in Cohen, 879 F.Supp. 214 as affording intercollegiate varsity opportunities to men. Brown's statements to the contrary are completely unfounded.[7]

These first two elements of the plan, which disregard the explicit language of the March 29, 1995 Opinion, are more than sufficient to suggest that defendants have not made a good faith effort to comply with this Court's mandate. However, I also note that Brown's proposal to cut members of men's teams and require coaches to maintain more members on certain (mostly women's) teams could, depending on details not included in the "comprehensive" plan for compliance, also render the proposal invalid. An institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons. A university does not treat its men's and women's teams equally if it allows the coaches of men's teams to set their own maximum capacity limits but overrides the judgment of coaches of women's teams on

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[7] Brown argues that if this Court refuses to count women's junior varsity positions as intercollegiate participation opportunities, then, to be consistent the Court must eliminate a number of players from the varsity football total to account for 'junior varsity' members. This statement is gravely misleading because the football team at Brown is a single, integrated varsity team. Although there are a group of players that are referred to as "junior varsity," these players function on a varsity level. For example, the football team is coached as a single unit and the "junior varsity" members are essential to the functioning of the varsity team. In the words of the former head football coach, "We were all one team." Trial Tr. 12/7/94 at 109.

the same matter.[8]

Finally, as I have already explained in Cohen, 879 F.Supp. at 210, I cannot agree with Brown that Title IX imposes a quota system,[9] as that term has traditionally been understood. As Cohen, 879 F.Supp. at 210 detailed in language that Brown insists upon disregarding, the Title IX remedial scheme is fundamentally different from traditional affirmative action programs. Quotas, as commonly understood, require that established positions, which would otherwise have no official gender or racial requirements, be filled with members of a disadvantaged group, even if such candidates are believed to be less qualified than majority group applicants. Title IX, in contrast, requires institutions to establish proportionate numbers of athletic opportunities for each gender where the institution chooses to field separate teams for each gender, to the extent that there is the interest and ability

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[8] Brown's plan to require a minimum number of female participants, regardless of interest and ability, on existing varsity teams more nearly enacts quotas and preferential treatment than do the measures that defendants so vigorously resist. Creating teams, in which there is unsatisfied interest and ability, that will provide a more equal number of positions for men and women, and allowing all coaches to determine the ideal size of such teams imposes no advantages or disadvantages on either gender. However, for the athletic department to interfere, in a gender-specific way, with the coaches' decisions imposes unfair advantages and disadvantages.

[9] Thus I give no credence to defendants' statement that "The Court's analysis, based upon [the Policy Interpretation] is cast in considerable doubt as a model for an ongoing remedy in this case by [a recent memorandum of President Clinton] which, inter alia, requires elimination of any programs which create a quota, create preferences for unqualified individuals or create reverse discrimination." See Mem. in Resp. to Pls.' Obj. to Compliance Plan at 1.

to field an equal number of athletic positions. To field substantially proportionate numbers of athletic positions for each gender, where this is possible, can hardly be said to impose advantages or disadvantages on one gender or the other. Rather, the statute eradicates advantages and disadvantages imposed on the basis of gender.

Both plaintiffs and defendants are correct: the litigation in this case has dragged on long enough. It is my understanding from the text of Brown's proposed plan that the institution has three primary goals in complying with this Court's order. The University wants to save as many men's positions as possible, invest no additional money in its intercollegiate athletic program, and proceed to the Court of Appeals without further delay. See Mem. in Resp. to Pls.' Obj. to Compliance Plan at 2, 4. Defendants state in the plan that their Phase II (elimination of men's teams) exists as a supplement to Phase I, in the event that Phase I is found to be insufficient to achieve compliance. However, given that this Court has found Phase I to be wholly inadequate, implementation of Phase II at this juncture would result in massive demotion of men's teams. It is clear that this outcome would defeat the University's goals. While the specter of severe cuts in the men's program lends a dramatic quality to Brown's position on Title IX, drastic reduction in the men's program is totally unnecessary.

Brown would have been in compliance with this Court's Opinion and Order if its plan had met the requirements of any of the three prongs delineated above. Unfortunately, Brown's proposed plan to

comply with prong one fails to meet the criteria of prong one. In the interest of avoiding "protracted litigation over a compliance plan," Mem. in Resp. to Pls.' Obj. to Compliance Plan at 13, and expediting the appeal process, I will order specific relief consistent with Brown's stated objectives.

I have concluded that Brown's stated objectives will be best served if I design a remedy to meet the requirements of prong three rather than prong one. In order to bring Brown into compliance with prong one under defendants' Phase II, I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary. The easy answer lies in ordering Brown to comply with prong three by upgrading the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status. In this way, Brown could easily achieve prong three's standard of "full and effective accommodation of the underrepresented sex." This remedy would entail upgrading the positions of approximately 40 women. In order to finance the 40 additional women's positions, Brown certainly will not have to eliminate as many as the 213 men's positions that would be cut under Brown's Phase II proposal. Thus, Brown will fully comply with Title IX by meeting the standards of prong three, without approaching satisfaction of the standards of prong one.

It is clearly in the best interest of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than,

as under Brown's plan, no increase in women's opportunities and a large decrease in men's opportunities. Expanding women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.

III.

Defendants' proposed compliance plan is hereby rejected. Brown University is ordered to elevate and maintain women's gymnastics, women's water polo, women's skiing, and women's fencing to university-funded varsity status. This part of the order is stayed pending appeal. In the interim, the preliminary injunction, enjoining Brown from eliminating or reducing in status any existing women's varsity team, more fully outlined in my Opinion and Order of December 22, 1992, Cohen v. Brown Univ., 809 F.Supp. 978, 1001 (D.R.I. 1992), will remain in full force and effect.

SO ORDERED:

Raymond J. Pettine
Senior U.S. District Judge

August 16, 1995

Entered as an Order of this Court August 17, 1995.

Celeste Ann Patnaude
Deputy Clerk

Exhibit B

Lori Bullock

From: Arthur H. Bryant <abryant@baileyglasser.com>
Sent: Sunday, June 28, 2020 8:54 PM
To: Lori Bullock
Cc: Lynette Labinger
Subject: Fwd: Brown University Title IX Case -- Specific Questions You Wanted re Sailing Teams

Per your request

Sent from my iPhone

Begin forwarded message:

From: "Arthur H. Bryant" <abryant@baileyglasser.com>
Date: June 18, 2020 at 4:02:30 PM PDT
To: "Robert C. Corrente" <RCorrente@whelancorrente.com>
Cc: "Goldgeier, Eileen" <eileen_goldgeier@brown.edu>, "Green, James" <jmgreen@brown.edu>, Lynette Labinger <ll@labingerlaw.com>, Leslie Brueckner <lbrueckner@publicjustice.net>
Subject: Brown University Title IX Case -- Specific Questions You Wanted re Sailing Teams

Dear Bob,

Thank you, Eileen, and Jim for talking with me and my co-counsel today. We are looking forward to receiving the info you said you will provide us ASAP. We also need to know as soon as possible whether you will agree to provide the information we asked for and you said you would have to think about.

In regard to Brown's plans for the sailing teams, we really appreciate you saying that you will find out what you can and let us know. After my questions about the plans for the teams, who knew the most about them, and interviews with the most knowledgeable administrative person and the coach(es), I started to ask some specific questions about the sailing teams. You asked me to send them to you. They are:

1. When will the varsity coed and women's sailing teams' seasons be? Will both teams have the same coach? Will they practice together or separately? Will they compete at the same events? Who will they compete against?
2. Will an Ivy League Championship be offered in varsity coed sailing? If so, will this be the first year it will be offered?
3. Will an Ivy League Championship be offered in varsity women's sailing? If so, will this be the first year it will be offered?
4. Will there still be a club sailing team -- men's, women's or coed? Who will be on it? How many women? How many men?
5. Will all of the men participating in club sailing be allowed to participate in coed varsity sailing? If not, how many of the men will be allowed to participate in varsity coed sailing and what will the other be allowed to do?

Thank you,
Arthur

Arthur H. Bryant :: Of Counsel

Bailey & Glasser LLP
475 14th Street

Exhibit C

Suite 610 :: Oakland CA 94612
Office 510.622.8202 :: Fax 510.463.0241

_____

Arthur H. Bryant
Of Counsel

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Lori Bullock

From: Arthur H. Bryant <abryant@baileyglasser.com>
Sent: Sunday, June 28, 2020 8:55 PM
To: Lori Bullock
Cc: Lynette Labinger
Subject: Fwd: Sailing Q As and Unanswered Questions

Per your request

Sent from my iPhone

Begin forwarded message:

From: "Arthur H. Bryant" <abryant@baileyglasser.com>
Date: June 25, 2020 at 2:48:19 PM PDT
To: "Robert C. Corrente" <RCorrente@whelancorrente.com>
Cc: "Goldgeier, Eileen" <eileen_goldgeier@brown.edu>, "Jim Green (JMGreen@brown.edu)" <JMGreen@brown.edu>, Lynette Labinger <ll@labingerlaw.com>
Subject: Sailing Q&As and Unanswered Questions

Dear Bob,

Thanks for your answers to these questions. Please let me know where we stand on the other questions I asked during our June 18, 2020, meeting with you, Eileen Goldgeier, and Jim Green and you told me you'd get back to me about:

1. Please provide us with the June/preseason rosters -- like the ones you provided us for 2020-21, are using to predict athletic participation numbers and rates for 2020-21, and Jim Green said were gathered annually -- for the last three academic years.
2. Are there written plans for creating the varsity coed and/or women's sailing teams? If so, please provide them, as Jim Green said you would if they exist.
3. Please let us know when, if at all, you will make the administrative person(s) who knows the most about the plans for the varsity coed and/or women's sailing teams available for an interview.
4. Please let us know when, if at all, you will make the sailing coach (who you have now identified as John Mollicone) available for an interview.

Thank you,
Arthur

_____

Arthur H. Bryant
Of Counsel

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Exhibit C

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_____

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From: Robert C. Corrente <RCorrente@whelancorrente.com>
Sent: Thursday, June 25, 2020 12:06 PM
To: Lynette Labinger <ll@labingerlaw.com> Arthur H. Bryant <abryant@baileyglasser.com>
Cc: Goldgeier, Eileen <eileen_goldgeier@brown.edu> Jim Green (JMGreen@brown.edu) <JMGreen@brown.edu>
Subject: Sailing Q&As

CAUTIO : External Email

Lynette/Arthur:

As a follow up to our telephone call last week, Arthur forwarded a list of fifteen specific questions about the Women s arsity Sailing team and the Co-ed arsity Sailing team. We conferred with John Mollicone, and provide the following responses:

1. When will the varsity coed and women's sailing teams' seasons be? Both teams will compete in the fall and the spring.
2. Will both teams have the same coach? Yes John Mollicone and two assistant coaches will coach both teams.
3. Will they practice together or separately? The two teams will practice together.
4. Will they compete at the same events? o. Both teams will compete in separate events every weekend during the fall and spring seasons.
5. Who will they compete against? There are approximately 40 universities that field a women's and/or co-ed sailing team at the varsity level.
6. Will an Ivy League Championship be offered in varsity coed sailing? o. At least five Ivy universities must field a varsity

Exhibit C

team in order to have an Ivy League championship presently, there are only four universities that field a varsity co-ed sailing team.
7. If so, will this be the first year it will be offered? /A.
8. Will an Ivy League Championship be offered in varsity women's sailing? Yes.
9. If so, will this be the first year it will be offered? Yes.
10. Will there still be a club sailing team -- men's, women's or coed? Yes depending on the student turnout, we expect to field a coed and/or women's club sailing team(s).
11. Who will be on it? That will depend on the student turnout -- see below.
12. How many women? Unknown. since it depends on who turns out when the season begins. The club teams will consist of those sailors who do not make the varsity, and will fold in the former recreational program sailors.
13. How many men? Unknown. since it depends on who turns out when the season begins. The club teams will consist of those sailors who do not make the varsity, and will fold in the former recreational program sailors
14. Will all of the men participating in club sailing be allowed to participate in coed varsity sailing? o.
15. If not, how many of the men will be allowed to participate in varsity coed sailing and what will the other be allowed to do? Our expected roster is 10 male student athletes on the varsity co-ed sailing team, and the remaining sailors will go to the club team.

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BROWN UNIVERSITY DEPARTMENT OF ATHLETICS

2018-2019 Intercollegiate Athletic Participation Numbers

Full Time Degree Seeking Undergraduates Fall 2018

Men	3113	46.28%
Women	3613	53.72%
Total	6726	

Women's Teams	1st Comp.	Last Comp.	Average	Minimum	
Basketball	18	16	17	15	
Crew*	54	48	51	52	
Cross Country	24	24	24	31	
Equestrian	24	19	21.5	32	
Fencing	13	14	13.5	16	
Field Hockey	23	23	23	22	
Golf	11	11	11	10	
Gymnastics	14	14	14	14	
Ice Hockey	23	23	23	23	
Lacrosse	33	32	32.5	27	
Rugby	20	32	26	24	
Skiing	9	9	9	10	
Soccer	25	25	25	26	
Softball	20	20	20	18	
Squash	14	14	14	15	
Swimming	37	37	37	30	
Tennis	10	10	10	12	
Track - indoor	54		52	57	
- outdoor		50			
Volleyball	19	19	19	19	
Water Polo	24	24	24	17	
		Actual:	466.5	470	Target

* 1st Comp includes 4 women on the men's crew team

** Last Comp includes 3 women on the men's crew team

Varsity Athletes 2018-2019

Men	447.5	48.96%
Women	466.5	51.04%
Total	914	

Exhibit D

BROWN UNIVERSITY DEPARTMENT OF ATHLETICS

2018-2019 Intercollegiate Athletic Participation Numbers

Full Time Degree Seeking Undergraduates Fall 2018

Men	3113	46.28%
Women	3613	53.72%
Total	6726	

Men's Teams	1st Comp.	Last Comp.	Average	Maximum	
Baseball	28	26	27	26	
Basketball	15	15	15	13	
Crew	45	39	42	46	
Cross Country	17	17	17	18	
Fencing	8	9	8.5	14	
Football	91	89	90	98	
Golf	9	8	8.5	8	
Ice Hockey	28	29	28.5	28	
Lacrosse	43	43	43	38	
Soccer	26	26	26	24	
Squash	13	14	13.5	12	
Swimming	28	28	28	24	
Tennis	11	11	11	10	
Track - indoor	47		45	50	
- outdoor		43			
Water Polo	19	19	19	15	
Wrestling	26	25	25.5	25	
		Actual:	447.5	449	Target

Varsity Athletes 2018-2019

Men	447.5	48.96%
Women	466.5	51.04%
Total	914	

Exhibit D

BROWN UNIVERSITY DEPARTMENT OF ATHLETICS

2019-2020 Intercollegiate Athletic Participation Numbers

Full Time Degree Seeking Undergraduates Fall 2019

Men	3249	47.71%
Women	3561	52.29%
Total	6810	

Women's Teams	1st Comp.	Last Comp.	Average	Minimum	
Basketball	15	12	13.5	15	
Crew*	50	51	50.5	52	
Cross Country	18	20	19	31	
Equestrian	24	23	23.5	32	
Fencing	11	13	12	16	
Field Hockey	24	23	23.5	22	
Golf	9	9	9	10	
Gymnastics	15	15	15	14	
Ice Hockey	19	18	18.5	23	
Lacrosse	30	30	30	27	
Rugby	32	36	34	24	
Skiing	10	10	10	10	
Soccer	27	27	27	26	
Softball	18	18	18	18	
Squash	14	14	14	15	
Swimming	38	38	38	30	
Tennis	8	8	8	12	
Track - indoor	43	43	43	57	
- outdoor	*Did not have a season				
Volleyball	19	20	19.5	19	
Water Polo	23	23	23	17	
		Actual:	449	470	Target

* 1st Comp includes 2 females on the men's crew team

** Last Comp includes 3 female on the men's crew team

Varsity Athletes 2019-2020

Men	448	49.94%
Women	449	50.06%
Total	897	

Exhibit E

BROWN UNIVERSITY DEPARTMENT OF ATHLETICS

2019-2020 Intercollegiate Athletic Participation Numbers

Full Time Degree Seeking Undergraduates Fall 2019

Men	3249	47.71%
Women	3561	52.29%
Total	6810	

Men's Teams	1st Comp.	Last Comp.	Average	Maximum	
Baseball	29	30	29.5	26	
Basketball	14	14	14	13	
Crew	38	37	37.5	46	
Cross Country	15	15	15	18	
Fencing	11	11	11	14	
Football	88	89	88.5	98	
Golf	8	8	8	8	
Ice Hockey	29	30	29.5	28	
Lacrosse	48	48	48	38	
Soccer	26	25	25.5	24	
Squash	15	15	15	12	
Swimming	28	28	28	24	
Tennis	11	11	11	10	
Track - indoor	44	46	45	50	
- outdoor	*Did not have a season				
Water Polo	20	20	20	15	
Wrestling	22	23	22.5	25	
		Actual:	448	449	Target

Varsity Athletes 2019-2020

Men	448	49.94%
Women	449	50.06%
Total	897	

Exhibit E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

AMY COHEN, et al.
Plaintiffs

v.

BROWN UNIVERSITY, et al.
Defendants

NH C.A. No. 99-485-B
RI C.A. No. 92-197

ORDER BY CONSENT

This matter came before the District Court, Hon. Paul Barbadoro, Chief Judge, sitting by designation for the District of Rhode Island, upon the application of the parties, by their counsel, for the entry of an Order clarifying the terms of the Joint Agreement ("Joint Agreement") of the parties of June 23, 1998 and entered by the Court in its Judgment of October 15, 1998.

The Court makes the following findings:

1. The Court's authority to enter the within Order is conferred by section V.C. of the Joint Agreement ("The Court shall retain jurisdiction concerning interpretation, enforcement and compliance with this Agreement.")

2. The parties seek to recognize the existence of formal, independent teams for women and for men within the co-ed golf program described in section II.G. of the Joint Agreement.

3. The parties acknowledge that, in operating a co-ed golf program, Brown University has provided separate competition for men and for women in its co-ed golf program.

4. The parties acknowledge and agree that, by formally recognizing the existence of a "women's golf team" and a "men's golf team" within the co-ed golf program through this Order by Consent, no change, to the disadvantage of women, in the structure or financing of the golf program or in the relative treatment of men and women within the golf program is intended or anticipated.

5. The parties seek to recognize and report to the NCAA and the Ivy League the existence of women's and men's golf so as to enhance the status of the women's golf program at Brown University and in the Ivy League and to thereby qualify the Ivy League women's golf conference champion in 2000-2001 and thereafter to an automatic bid to participate in post-season competition sponsored by the NCAA.

6. Because the formal recognition of the existence of a separate men's and women's team within the co-ed golf program is neither intended nor expected to constitute an alteration in the structure of Brown's Intercollegiate Athletic Program, as that program is described in

Exhibit F

section II of the Joint Agreement, the parties agree that the recognition of men's golf as a separate donor-funded team shall not constitute the addition of a men's team at the donor-funded level within the meaning of section III.A.3. of the Joint Agreement, nor shall it meet the terms of subparagraphs 1 through 4, or any of them, of section III.C. of the Joint Agreement.

7. The parties further agree that, once this Order by Consent has been entered, any action by Brown to eliminate, replace or substitute the women's golf team shall be subject to the terms of section III. B., paragraphs 1 and 2 of section III. C., and section III. E. of the Joint Agreement, governing the elimination, replacement, or substitution of intercollegiate athletic teams for women or co-ed teams.

8. The parties further agree that, once this Order by Consent has been entered, any action by Brown hereinafter to change the status of the men's golf team from donor-funded to university-funded shall be subject to the terms of section III.A.2.a., and paragraph 4 of section III. C. of the Joint Agreement, governing the change in status of men's teams.

Upon the agreement of the parties, the findings set forth above, and in due consideration thereof, it is hereby

ORDERED:

1. The recognition by Brown of the existence of formal, independent teams for women and for men within the co-ed golf program shall not constitute a modification or alteration of the Intercollegiate Athletic Program at Brown as described in section II. G. of the Joint Agreement and does not constitute the addition of a men's team at the donor-funded level within the meaning of section III.A.3. of the Joint Agreement, nor does it meet the terms of subparagraphs 1 through 4, or any of them, of section III. C. of the Joint Agreement.

2. Any action by Brown to eliminate, replace or substitute the women's golf team shall be subject to the terms of section III. B., paragraphs 1 and 2 of section III. C., and section III. E. of the Joint Agreement, governing the elimination, replacement, or substitution of intercollegiate athletic teams for women or co-ed teams.

3. Any action by Brown to change the status of the men's golf team, from donor-funded to university-funded shall be subject to the terms of section III.A.2.a., and paragraph 4 of section III. C. of the Joint Agreement, governing the change in status of men's teams.

4. The parties shall retain the right to petition the Court to order the restoration of the golf program to its current co-ed status and structure or to take other appropriate action in the event that the recognition of separate men's and women's golf teams is, in the future, inconsistent with the facts found in this Consent Order, the Judgment or Joint Agreement in this matter or applicable law or regulation.

ENTERED as the Order of the Court this 18th day of July; 2000.

By Order,

Enter: _____
Chief Judge

AGREED AS TO FORM AND SUBSTANCE:

Lynette Labinger
Attorneys for Plaintiffs
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344 Wickenden Street
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Telephone: (401) 421-9794
Fax: (401) 421-0132

Julius C. Michaelson
Jeffrey S. Michaelson
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Michaelson, Michaelson & Zurier
321 South Main Street
Providence, RI 02903
Telephone: (401) 277-9300

cc: Counsel of Record
Clerk, USDC-RI (original)

Exhibit F

Lynette Labinger

From: Lynette Labinger
Sent: Thursday, June 11, 2020 3:21 PM
To: Green, James
Cc: Raymond A. Marcaccio (ram@om-rilaw.com); Amato DeLuca (bud@delucaandweizenbaum.com); Leslie Brueckner (lbrueckner@publicjustice.net); Sandra L. Duggan (sduggan@lfsblaw.com); Arthur Bryant
Subject: RE: Cohen v. Brown University

Hi Jim:

Brown has posted extensively concerning its decision-making process, but does not appear to have posted any of the committee studies, notes, analyses or reports that led to the determination to cut teams, including 5 women's varsity sports.

Accordingly, please provide us the following documents, or, if they are available on the internet, the URLs where they can be found:

1. The proceedings of the consultants who conducted an external review of Brown Athletics, apparently commencing in the 2018-19 academic year, including:
    a. All committee/consultant meeting agenda and minutes, and correspondence with the University
    b. All charges to committee/consultant
    c. All data reviewed by the committee/consultant
    d. All analyses of team composition, sizes, rosters, including projections and "what-if scenario" analyses
    e. All reports and recommendations made by the committee/consultant

2. The proceedings of the Committee on Excellence in Athletics, including:
    a. All committee meeting agenda and minutes, and correspondence with the University
    b. All charges to committee
    c. All data reviewed by the committee, including reports and recommendations provided by or through the staff to the committee
    d. All analyses of team composition, sizes, rosters, including projections and "what-if scenario" analyses
    e. All reports and recommendations made by the committee, including all projections of team size, composition, and rosters of the "before" and "after" program

3. The proceedings and actions of the University (defined as including all departments and offices, including the Department of Athletics, Office of the President, Board of Trustees and Corporation) in considering, adopting and/or approving the decision, including:
    a. All committee meeting agenda and minutes, and correspondence within the University
    b. All data reviewed by the University not provided above
    c. All analyses of team composition, sizes, rosters, including projections and "what-if scenario" analyses, not provided above
    d. All reports, recommendations made and/or resolutions adopted by the University, including all projections of team size, composition, and rosters of the "before" and "after" programs

Exhibit G

While it would be ideal to have this in hand before our conference call tomorrow at 1 pm, due to the exigencies of time, we are specifically asking that the conference NOT be delayed in order for you to provide this information.

Best,

Lynette Labinger
Lynette Labinger, Attorney at Law
128 Dorrance Street, Box 710
Providence, RI 02903
401-465-9565
LL@labingerlaw.com

From: Lynette Labinger
Sent: Wednesday, June 10, 2020 8:22 PM
To: Green, James <jmgreen@brown.edu>
Cc: Raymond A. Marcaccio (ram@om-rilaw.com) <ram@om-rilaw.com>; Amato DeLuca (bud@delucaandweizenbaum.com) <bud@delucaandweizenbaum.com>; Leslie Brueckner (lbrueckner@publicjustice.net) <lbrueckner@publicjustice.net>; Sandra L. Duggan (sduggan@lfsblaw.com) <sduggan@lfsblaw.com>; Arthur Bryant <abryant@baileyglasser.com>
Subject: Re: Cohen v. Brown University; Notice of Gross Violation

Hi Jim—Arthur Bryant will also be participating in the call on Friday at 1 pm. I will circulate a conference call-in number.

Lynette Labinger, Attorney at Law
LL@labingerlaw.com
128 Dorrance St., Box 710
Providence, RI 02903
401-465-9565

On Jun 10, 2020, at 2:59 PM, Lynette Labinger <ll@labingerlaw.com> wrote:

> Hi Jim—Let's talk at 1 pm on Friday. Given the significance of the decision-making, it is disappointing that Brown, as an institution, is apparently unprepared to address this issue immediately.
>
> In the meantime, pursuant to Section V.(D) of the Agreement ("Additional Information"), please provide the year-end athletic information for 2019-20, which should be available due to the early end of competition due to COVID-19, so that we can evaluate the current level of compliance with the Settlement Agreement.
>
> Best,
>
> Lynette Labinger

Exhibit G

Lynette Labinger, Attorney at Law
128 Dorrance Street, Box 710
Providence, RI 02903
401-465-9565
LL@labingerlaw.com

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From: Green, James <jmgreen@brown.edu>
Sent: Wednesday, June 10, 2020 1:00 PM
To: Lynette Labinger <ll@labingerlaw.com>
Subject: Re: Cohen v. Brown University; Notice of Gross Violation

Lynette, I am in receipt of the Notice of Gross Violation which you forwarded earlier today. I will not be ready at 3pm today to discuss the substantive issues. I will be prepared to discuss compliance issues by Friday afternoon. I can be available to share information and discuss this issue any time after 1 pm on Friday. Please let me know when you are able to discuss. Jim

BROWN

J.M. (Jim) Green
Deputy General Counsel
Office of the General Counsel
Brown University
Box 1913
Providence, RI 02912
JMGreen@brown.edu | 401.863.3122

On Wed, Jun 10, 2020 at 11:38 AM Lynette Labinger <ll@labingerlaw.com> wrote:

> Dear Jim:
>
> You are hereby notified that Brown's actions to go forward with its announced decision to cut five viable women's teams from the varsity program while reversing its decision to eliminate men's cross-country and track—which was presented by you to me (and in the announcement below and referenced letter from the President of June 6, 2020) as necessary for Brown to achieve a program within 2.25% of the permitted variance—constitutes a "gross violation" of the Settlement Agreement within the meaning of Section V.(E) for which Plaintiffs are authorized to seek direct court intervention after notice, given herewith, and a reasonable period of time to meet and confer in an attempt to resolve the issue.

Exhibit G

It does not appear that Brown's decision to cut five viable women's varsity teams while retaining men's cross-country and track is calculated to achieve, nor will it achieve, a variance of 2.25% or less. Unless Brown presents the precise methods and numbers by which Brown can demonstrate its ability to achieve compliance within the permitted variance of 2.25% for 2020-2021 after eliminating five viable women's teams from its varsity roster, we consider Brown's revised plan to be a deliberate decision not to comply with the Settlement Agreement.

We have scheduled a telephone call for 3 pm today. Please have facts and figures available. Time is of the essence.

Best,

Lynette Labinger, Attorney at Law
LL@labingerlaw.com
128 Dorrance St., Box 710
Providence, RI 02903
401-465-9565

OFFICE OF THE PRESIDENT
BROWN UNIVERSITY

Dear Brown Community,

We have heard clearly from our community over the past couple of weeks that the University's decision to transition men's varsity track, field and cross country to club status will have real and lasting implications for efforts to build and sustain diverse and inclusive communities for our students at Brown, and particularly our community of black students and alumni.

Exhibit G

Our students, alumni and parents took the time to share their deeply personal stories of the transformative impact that participation in track, field and cross country has had on their lives. Many noted that, through Brown's history, these sports have been a point of entry to higher education for academically talented students who otherwise would not have had the opportunity, many of them students of color. In addition, we heard from members of the women's track, field and cross country teams who made a compelling case that eliminating the men's program would adversely impact the women's program.

Considering these and other factors, the University has decided to reinstate the varsity status of men's track, field and cross country at Brown. This change is effective immediately and does not alter other decisions to reduce the number of varsity sports as part of the Excellence in Brown Athletics Initiative.

As I wrote in my letter to the community on Saturday, the primary reason for eliminating men's track, field and cross country was to help Brown remain in compliance with a 1998 settlement agreement stemming from a Title IX lawsuit. This was not the case for any of the other teams that were transitioned out of varsity status.

This settlement agreement, which pertains only to Brown and is unique in all of collegiate athletics, created tight constraints specific to Brown regarding the balance of varsity athletics opportunities for women relative to men. The University has achieved the required balance historically by maintaining squad sizes of men's teams that, on average, are below Ivy League squad sizes. This has been an impediment to Brown achieving broad athletic excellence. At the same time, and as a result, Brown has a larger fraction of athletics opportunities for women than most of its peers.

The reinstatement of men's track, field and cross country will have implications for the squad sizes of Brown's varsity teams. However, we have determined that with some modifications, Brown will be able to remain in compliance with the requirements of the legal settlement and with Title IX for the time being. In the coming year, the University will

examine alternative strategies for addressing the issues that arise from the settlement agreement.

Maintaining and strengthening diversity was a foundational principle in considering the final makeup of varsity teams from the outset of the Excellence in Brown Athletics Initiative. The original revised roster of varsity sports maintained Brown's overall diversity in varsity athletics, but we now more fully appreciate the consequences of eliminating men's track, field and cross country for black students in our community and among our extended community of black alumni.

As I shared this weekend, members of the Brown athletics community will receive invitations in the coming days to participate in virtual meetings to hear directly from Director of Athletics Jack Hayes and me about the decisions underlying the athletics initiative. We hope to address common questions being raised and ongoing areas of concern.

Again, I remain committed to the decision to reduce the number of varsity teams to increase the competitiveness of athletics at Brown. We will do so while providing equal opportunities to participate in athletics, regardless of sex, and remaining true to our values of supporting diversity and inclusion.

Sincerely,

Christina H. Paxson
President

BROWN

Exhibit G

Exhibit G