Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *pro hac vice*

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

Case No. 1:20-cv-00184-DCN

MOTION FOR LEAVE TO FILE SUPPLEMENTAL OPPOSITION TO MOTION TO INTERVENE [DKT. 30]

Plaintiffs respectfully request leave to file the attached supplemental opposition to Proposed Intervenors' motion to intervene. (Dkt. 30.) Plaintiffs seek leave in order to address additional grounds for denying intervention revealed by Proposed Intervenors' opposition to Plaintiffs' motion for a preliminary injunction (Dkt. 46), which Proposed Intervenors filed shortly after Plaintiffs filed their opposition to the motion to intervene (Dkt. 45). Proposed Intervenors did not their proposed preliminary injunction opposition to their motion to intervene or their motion to file a proposed opposition to Plaintiffs' motion for a preliminary injunction. Thus, Plaintiffs were unable to explain in their intervention opposition why Proposed Intervenors' opposition to the preliminary injunction motion further shows that intervention is not warranted.*

The additional grounds against intervention revealed by Proposed Intervenors' proposed preliminary injunction opposition are as follows. First, as explained in Plaintiffs' proposed supplemental opposition, Proposed Intervenors have now acknowledged Defendants' adequate defense of this matter, confirming that intervention is unwarranted. Second, Proposed Intervenors' filing further evidences their intent to introduce irrelevant

* On June 12, 2020, the Court accepted for filing Proposed Intervenors' opposition to the preliminary injunction motion, but stated that it would decide the motion to intervene after the July 22, 2020 hearing. (Dkt. 47.) The Court also provided Plaintiffs with an opportunity to respond to the Proposed Intervenors opposition to the preliminary injunction motion, *id.*, which Plaintiffs will do in a separate filing later. Here, Plaintiffs seek only to supplement their opposition to the motion to intervene.

issues into this lawsuit, including a declaration from an out-of-state student who does not compete in Idaho, and a lengthy purported expert opinion from an individual who has been found by a federal district court to lack credibility because he "misrepresent[s]" facts, relies on "illogical references," and "fabricate[s] anecdote[s]." *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188–89 (N.D. Cal.), appeal dismissed and remanded, 802 F.3d 1090 (9th Cir. 2015). These tactics will not advance the efficient and professional resolution of this matter.

Given that Proposed Intervenors waited to file their proposed preliminary injunction opposition until after Plaintiffs opposed both their motion to file such a brief and their request for intervention, fairness requires that Plaintiffs be permitted to supplement their intervention opposition.

Respectfully submitted,

Dated: June 15, 2020.

/s/ Richard Eppink

Richard Eppink
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF IDAHO

Gabriel Arkles
James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Kathleen Hartnett
Elizabeth Prelogar
Andrew Barr
COOLEY LLP

Catherine West
LEGAL VOICE

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of June, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Bruce D. Skaug
bruce@skauglaw.com
Raul Labrador
raul@skauglaw.com
Roger G. Brooks
rbrooks@ADFlegal.org
Jeffrey Shafer
jshafer@ADFlegal.org
Kristin Waggoner
kwaggoner@ADFlegal.org
Parker Douglas
pdouglas@ADFlegal.org
Christiana Holcomb
cholcomb@ADFlegal.org
Attorneys for Proposed Intervenors

Steven L. Olsen
steven.olsen@ag.idaho.gov
W. Scott Zanzig
scott.zanzig@ag.idaho.gov
Dayton P. Reed
dayton.reed@ag.idaho.gov
Attorneys for Bradley Little, Sherri Ybarra, Individual members of the State Board of Education, Boise State University, Marlene Tromp, Individual members of the Idaho Code Commission

Matt Wilde
mattwilde@boisetate.edu
Attorney for Boise State University andMarlene Tromp

By: /s/ Richard Eppink
RICHARD EPPINK

Richard Eppink (Bar No. 7503)
AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION
P. O. Box 1897
Boise, ID 83701
T: (208) 344-9750 ext. 1202
REppink@acluidaho.org

Gabriel Arkles*
James Esseks*
Chase Strangio*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.,
New York, NY 10004
T: (212) 549-2569
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Kathleen Hartnett*
COOLEY LLP
101 California Street 5th Floor
San Francisco, CA 94111-5800
T: (415) 693-2000
F: (415) 693-2222
khartnett@cooley.com

Elizabeth Prelogar*
COOLEY LLP
1299 Pennsylvania Avenue, NW Suite 700
Washington D.C. 20004-2400
T: (202) 842-7800
F: (202) 842-7899
eprelogar@cooley.com

Andrew Barr*
COOLEY LLP
380 Interlocken Crescent, Ste. 900
Broomfield, CO 80021-8023
T: (720) 566-4000
F: (720) 566-4099
abarr@cooley.com

Catherine West*
LEGAL VOICE
907 Pine Street, Unit 500
Seattle, WA 98101
T: (206) 682-9552
F: (206) 682-9556
cwest@legalvoice.org

* Admitted *pro hac vice*

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LINDSAY HECOX, et al.,

Plaintiffs,

v.

BRADLEY LITTLE, et al.,

Defendants.

Case No. 1:20-cv-00184-DCN

PLAINTIFFS' [PROPOSED] SUPPLEMENTAL RESPONSE TO MOTION TO INTERVENE [DKT. 30]

Proposed Intervenors Madison ("Madi") Kenyon's and Mary ("MK") Marshall's overlength brief opposing Plaintiffs' motion for a preliminary injunction ("Proposed PI Opposition") (Dkt. 46) confirms that the Court should deny intervention. Any interest that Proposed Intervenors have in this matter is fully protected by Defendants (the "State"), which can be supported by Madi and MK's participation as *amicus*.

The Proposed PI Opposition fully aligns with the State's positions on the questions actually presented by this case. It expressly acknowledges that the State is adequately defending H.B. 500, observing that the "legal authorities, standards, and arguments" in opposing Plaintiffs' motion for a preliminary injunction are "well covered by the State." (Dkt. 46 at 1.) This acknowledgement prevents Proposed Intervenors from establishing, as they must for intervention, a "very compelling showing" of inadequate defense by the State sufficient to overcome the presumption of an adequate defense. (Dkt. 45 at 12–16 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).)

Proposed Intervenors claim that their Proposed PI Opposition raises "additional facts that bear importantly on the 'balance of the equities'" and "unpack[s] some basic flaws in the very foundations of Plaintiffs' Equal Protection claim," (Dkt. 46 at 1), but these contentions are inaccurate and cannot support intervention.

The claimed "additional facts" include no relevant information that the

State omitted or that otherwise suggests an inadequate defense. The two new declarations that Proposed Intervenors attach to their Proposed PI Opposition are duplicative of the State's evidence or irrelevant to the claims at issue. The first declaration is from an out-of-state student-athlete who does not compete in Idaho and will not be affected in any way by H.B. 500. (Dkt. 46-1.) Her declaration neither demonstrates that the State's defense is inadequate nor assists this Court's assessment of the unconstitutionality of H.B. 500.

The second declaration is from a proposed expert who opines at length about his objections to mainstream treatment for gender dysphoria. (*See* Dkt. 46 at 8.) Whether doctors should prescribe treatment for gender dysphoria is not at issue in this case. Moreover, the State already has submitted the report of one claimed expert at the preliminary injunction stage and is free to submit other proposed experts at later stages. *See ALDF v. Otter*, 300 F.R.D. 461, 465 (D. Idaho 2014) (noting that the State can "acquire additional specialized knowledge through discovery (e.g., by calling upon intervenor-defendants to supply evidence) or through the use of experts" (internal citations omitted)). To the extent Proposed Intervenors would present a different expert at the preliminary injunction stage, this is the type of "mere differenc[e] in litigation strategy" that is "not enough to justify intervention as a matter of right. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). Dr. Levine's opinions have also been discredited by a

sister court within the Circuit. *See Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188-89 (N.D. Cal. 2015) ("The Court gives very little weight to the opinions of Levine"; "the Court concludes that his opinion is not credible because of illogical inferences, inconsistencies, and inaccuracies in the report"; "The Court concludes that these serious weaknesses in Levine's report undermine his credibility as an expert.").

Intervention is also not warranted to allow Madi and MK to "unpack" the legal arguments in the case, (Dkt. 46 at 1), given their concession that the "legal authorities, standards, and arguments [are] well covered by the State." (Dkt. 46 at 1.) And far from "unpacking" otherwise unaddressed points of law relevant to this lawsuit, the Proposed PI Opposition simply repeats and refers to points the State has already made, with the addition of mischaracterizing the harm Plaintiff Lindsay Hecox claims (outrageously suggesting that she would have to show that she might commit suicide to be entitled to a preliminary injunction (Dkt. 46 at 2)), and deploying overheated rhetoric and *ad hominem* attacks against her that undermine principles of civility and the efficient and professional adjudication of this lawsuit. (*See, e.g.*, Dkt. 46 at 14–16 (misgendering* and belittling Lindsay and baselessly suggesting that her claimed injury is nothing more than a desire for a

* To **misgender** a person is "to identify the gender of (a person, such as a transsexual or transgender person) incorrectly (as by using an incorrect label or pronoun)." Misgender, Merriam-Webster, https://www.merriam-webster.com/dictionary/misgender (last accessed June 11, 2020).

"platform for personal expression").)

For these reasons, and those set forth in Plaintiffs' prior opposition to Proposed Intervenors' intervention motion (Dkt. 43), the motion should be denied.

Respectfully submitted,

Dated: June 15, 2020.

/s/ Richard Eppink

Richard Eppink
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF IDAHO

Gabriel Arkles
James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Kathleen Hartnett
Elizabeth Prelogar
Andrew Barr
COOLEY LLP

Catherine West
LEGAL VOICE

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of June, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Bruce D. Skaug
bruce@skauglaw.com
Raul Labrador
raul@skauglaw.com
Roger G. Brooks
rbrooks@ADFlegal.org
Jeffrey Shafer
jshafer@ADFlegal.org
Kristin Waggoner
kwaggoner@ADFlegal.org
Parker Douglas
pdouglas@ADFlegal.org
Christiana Holcomb
cholcomb@ADFlegal.org
Attorneys for Proposed Intervenors

Steven L. Olsen
steven.olsen@ag.idaho.gov
W. Scott Zanzig
scott.zanzig@ag.idaho.gov
Dayton P. Reed
dayton.reed@ag.idaho.gov
Attorneys for Bradley Little, Sherri Ybarra, Individual members of the State Board of Education, Boise State University, Marlene Tromp, Individual members of the Idaho Code Commission

Matt Wilde
mattwilde@boisetate.edu
Attorney for Boise State University andMarlene Tromp

By: /s/ Richard Eppink
RICHARD EPPINK