



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

May 20, 2021

TRANSMITTED VIA CM/ECF

Molly C. Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 7th Street
San Francisco, CA 94103

Re: *Hecox v. Little*, Case Nos. 20-35813, 20-35815

Dear Ms. Dwyer:

After oral argument, the Court requested a supplemental letter brief “addressing the following questions: 1) Is Lindsay Hecox’s claim moot because she is not enrolled at Boise State University? 2) Does Jane Doe have standing based on the risk of having her sex disputed?” The answer to the first question is yes, Hecox’s claim is moot, and the answer to the second question is no, Doe lacks standing. Mootness and standing are both jurisdictional issues, thus the preliminary injunction must be dissolved and the Complaint must be dismissed.

Hecox’s claims are moot because the Court cannot grant her an effectual remedy. Hecox’s withdrawal from Boise State University (“BSU”)—not HB

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500—prevents her from competing for BSU both now (she must be a student to compete) and in the future (Hecox cannot meet the NCAA’s academic eligibility requirements). As a result, Hecox cannot participate in athletics at BSU even if the Court continues to enjoin the enforcement of HB 500. The prospective relief Hecox seeks is thus not an effectual remedy. Without an available effectual remedy, Hecox’s claims are moot.

Jane Doe lacks standing because she does not face a certainly impending risk of having her sex challenged. As Judge Kleinfeld aptly noted at oral argument, Doe’s alleged fear of having her sex challenged hinges on characteristics that do not distinguish her from many other young women her age. What’s more, her athletic career at Boise High at most ends two days after the date of this filing. That limited window for a challenge greatly reduces any risk Doe faces. But even if Doe has standing now, her claims will be moot before the district court can reach the merits.

I. Hecox’s claims are moot because the Court cannot grant effectual relief.

“Mootness is a jurisdictional issue,” and thus it “can arise at any stage of litigation.” *Maldonado v. Lynch*, 786 F.3d 1155, 1160 (9th Cir. 2015) (quotation omitted); *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (citation omitted). When it comes to mootness, it does not “matter how vehemently the parties continue to

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dispute the lawfulness of the conduct that precipitated the lawsuit.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Instead, “[i]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever [sic] to a prevailing party, the appeal is moot and must be dismissed.” *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001) (quotation omitted).

Hecox’s withdrawal from BSU has made it impossible for the Court to grant her effectual relief. Hecox seeks prospective relief that would allow her “to participate in college athletics,” specifically to compete for BSU. 5-ER-767–71, ¶¶ 22, 31, 33, 38. To avoid mootness, that relief needs to be “between the parties.” *In re Pattullo*, 271 F.3d at 901. The question here then is: would an injunction enjoining Defendants from implementing and enforcing HB 500 allow Hecox to participate in athletics at BSU?

It would not. Hecox cannot participate in athletics at BSU because she does not attend BSU. Response Br. 17 n.4; Dkt. 136-2, ¶¶ 6, 8. HB 500 poses no barrier to her. *See* Idaho Code § 33-6203(2) (applying to students). As a result, an order enjoining Defendants from enforcing HB 500—like the preliminary injunction currently in place—does not itself remedy her interest in participating in athletics. Until Hecox re-enrolls at BSU, further enforcement of the preliminary injunction and further adjudication of Hecox’s claims are advisory and improper. For that

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precise reason, courts regularly find moot cases in which former students seek prospective relief against their schools. *E.g.*, *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975) (“[I]n these circumstances, it seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue.”); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (“Because we cannot remedy the student-plaintiff’s injury with injunctive or declaratory relief, the student-plaintiff’s claims for those forms of relief are moot.”); *K. Y. ex. Rel. Yu v. Schmitt*, 799 F. App’x 485, 487 (9th Cir. 2020) (“Because there is no live case or controversy involving Plaintiff justifying declaratory and injunctive relief against [the] school’s . . . policy, we lack jurisdiction[.]” (cleaned up)); *Shevtsov v. Los Angeles Unified Sch. Dist.*, 134 F.3d 379 (9th Cir. 1998) (table) (finding that when the plaintiff was no longer attending the school at issue, “[t]he claims for injunctive relief directed toward [the school] are moot”); *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997) (“The former students are the only plaintiffs before us, and as to them, any claim for equitable relief is clearly moot.”); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) (noting that when “policies affected certain students *because and only because* they were students” the “alleged injury ceased to exist” “upon [the plaintiffs] leaving school”); *Nomi v. Regents for Univ.*

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of Minnesota, 5 F.3d 332, 334 (8th Cir. 1993) (Plaintiff “seeks injunctive, prospective relief. Whatever injury he may have suffered as a student, we can no longer grant him relief.”).

The “representation of counsel” at oral argument that Hecox intends to return to BSU in the fall does not revive her claims. Counsel’s representations are not an allegation (they are not part of the pleadings) or evidence (an attorney is not a witness), so Hecox has not carried her burden of establishing jurisdiction at this stage of the litigation. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (Jurisdictional elements “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” (citations omitted)).

Even if the assertion that Hecox intends to return to BSU were properly in the record, her claims remain moot. “Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (quotation omitted). Hecox is not suffering a current injury because she does not attend BSU, so the question is whether a future injury based on her return to BSU is “certainly impending” or substantially likely. *See In re Zappos.com, Inc.*, 888

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F.3d 1020, 1024 (9th Cir. 2018) (quotation omitted). That is, to avoid mootness Hecox’s interests must have “sufficient immediacy and reality.” *Pub. Utilities Comm’n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1458 (9th Cir. 1996) (quotation omitted).

Hecox’s return to BSU—as well as any corresponding interest in participating in athletics at BSU—is not sufficiently immediate or based in reality to avoid mootness. In a footnote on appeal, Hecox said she took a “leave of absence from BSU” so that she could “work full time, establish her Idaho residency, and save money for school” before returning to BSU in the fall. Response Br. 17 n.4. Her student records suggest otherwise.

Hecox “never requested a ‘leave of absence’” from BSU. Dkt. 136-2, ¶ 7. In fact, she could not do so because BSU’s Registrar’s Office does not use the term or phrase “leave of absence” in situations like this one. *Id.* In any event, Hecox tried out for the women’s track and cross country teams on October 21, 2020. Dkt. 136-3, ¶ 3. She was notified the next day that she did not make the first cut. *Id.* at ¶ 4. Within a week, she withdrew completely from BSU. Dkt. 136-2, ¶¶ 3–4. She has taken no classes at BSU since then, and she is not enrolled to take any classes in the future even though registration for the Fall 2021 semester has been open for nearly two months. *Id.* at ¶¶ 6, 8.

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Hecox’s actions betray the “immediacy and reality” of her “interests” in participating in athletics at BSU. The “immediacy” of her intentions to enroll in the fall—when she has not acted for nearly two months—is doubtful. Even if she does enroll, the “reality” of her interest in remaining at BSU to participate in athletics is suspect. If Hecox genuinely plans to stay at BSU, it seems she would have enrolled in classes as soon as possible to secure seats in her preferred or required classes. What’s more, last time Hecox enrolled at BSU she stayed just long enough to litigate a preliminary injunction and then withdrew within a week of being cut from the track and cross country teams. Her conduct then and now reveals that she is not genuinely interested in staying at BSU, which she must do for the Court to provide effectual relief. An injunction allowing Hecox to participate in athletics at BSU serves no purpose if she does not remain in school. If the Court does not find Hecox’s claim moot—at least until she proves a genuine interest in remaining at BSU—then each step of this litigation will continue to be interrupted with mootness questions. Besides wasting resources, that approach permits Hecox to use federal courts to interfere with the enforcement of a state’s duly passed law even though she has no real need for relief.

Assuming, however, that Hecox eventually enrolls and remains at BSU, her claims still do not have the “sufficient immediacy” needed to avoid mootness.

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NCAA standards require Division I athletes to complete “40 percent of required coursework for a degree . . . by the end of the second year” and “60 percent by the end of the third year.” Staying on Track to Graduate, www.ncaa.org/student-athletes/current/staying-track-graduate (last visited May 19, 2021). And “[a]ll Division I student-athletes must earn at least six credit hours each term to be eligible for the following term[.]” *Id.* Hecox wants to participate in athletics at BSU, but her failure to complete any classes at BSU during the 2020–21 academic year means she is ineligible to compete—even if she tried out and made BSU’s team. As a result, there is not an immediate risk that HB 500 would prevent Hecox from competing for BSU even if she enrolls in the fall.

At bottom, this Court cannot grant Hecox relief because her withdrawal from BSU—not HB 500—is what prevents her from participating in athletics both now and in the future. Her claims are thus moot and must be dismissed.

II. Doe lacks standing because there is not a certainly impending or substantial risk of her sex being disputed.

As Defendants argued below and Intervenors have argued on appeal, Doe has no standing based on the risk of having her sex disputed. District Court Dkt. 40-1, pp. 5–8; District Court Dkt. 59, pp. 1–6; Intervenors’ Opening Br. 45–50; Intervenors’ Reply Br. 26–27. Doe fears a future injury: that she will at some point need to prove her sex to compete on her high school’s soccer and track teams. 5 -

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ER-771–73, ¶¶ 41, 46. To have standing based on this perceived future injury, the future injury must be “certainly impending” or there must be a “substantial risk that the harm will occur.” *In re Zappos.com, Inc.*, 888 F.3d at 1024 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). “[A]llegations of possible future injury are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (quotation omitted). Thus, a plaintiff cannot establish standing by alleging a threat of future harm based on “an extended chain of highly speculative contingencies.” *Nelsen v. King Cty.*, 895 F.2d 1248, 1252 (9th Cir. 1990).

Doe, however, has done just that. She says that she “does not commonly wear skirts or dresses,” “most of her closest friends are boys,” and she “has an athletic build.” 5-ER-773, ¶ 47. She believes “people sometimes think of her as masculine” “[b]ecause of these things,” so she “worries that people might use that as an excuse to ‘dispute’ her gender” “just to try to keep her from playing.” 5-ER-772–73, ¶¶ 46–47. As Judge Kleinfeld aptly noted at oral argument, the characteristics that Doe identifies do not distinguish her from many other young women her age. Doe’s “worries” also turn on the speculative action of a third party that may disingenuously dispute her sex to gain a competitive advantage, yet she has not identified a single person who has threatened or is likely to act so unsportsmanlike. *See Lujan*, 504 U.S. at 560-61 (to establish standing, a plaintiff’s

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“injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court”). At bottom, Doe has hardly *any* risk of having her sex disputed—let alone a “certainly impending” or “substantial risk.”

What’s more, Doe’s high school athletics career is coming to a rapid end. She was finishing her junior year when the Complaint was filed in April 2020, and nothing in the record suggests that she will not graduate on time from Boise High. 5-ER-762, ¶ 7. Boise High’s soccer teams play in the fall, so that season has ended. Boise Athletic Teams, https://boise.boiseschools.org/athletics__activities/boise_athletic_teams (last visited May 19, 2021). And assuming Doe qualified for the state championship meet, the track season ends two days after the filing of this letter brief. 2021 State Championships, <https://idhsaa.org/track-and-field> (last visited May 19, 2021). Even if HB 500 were implemented and enforced as of the date of this filing, there is too little time left for somebody to dispute Doe’s sex for the risk of a dispute to be substantial or certainly impending. And once her high school athletics career ends (if it hasn’t already), her claims will be moot.

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CONCLUSION

Hecox's claims are moot and Doe lacks standing. Because standing and mootness are jurisdictional issues, the Court should vacate the decision below, dissolve the injunction, and order the district court to dismiss the Complaint.

Respectfully,

/s/ W. Scott Zanzig

W. Scott Zanzig

Deputy Attorney General

cc: Counsel of Record

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