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Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

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

Dear Ms. Dwyer:

Following oral argument in this appeal on May 3, 2021, the panel ordered the parties to address whether Lindsay Hecox's claim is moot because she is not currently enrolled at Boise State University ("BSU") and whether Jane Doe[1] has standing based on the risk of having her sex disputed.

As to the first issue, Lindsay's claim is not moot. Her leave of absence from BSU is temporary. She has expressed a clear and definite intention to return to BSU and to try out again for the women's cross-country and track teams. Under the Supreme

[1] On March 19, 2021, the District Court granted Plaintiffs' unopposed motion to vacate the protective order that had allowed Jane Doe and her next friends and parents, Jean Doe and John Doe, to proceed under pseudonyms. *See* ECF No. 75. Jane Doe's real name is Kayden Hulquist. After she turned 18 years old, Kayden decided that she would like to be publicly identified in connection with this lawsuit. *See* ECF No. 74 at 2. Accordingly, Plaintiffs use Kayden's real name throughout this brief.

Court's and this Court's precedent, an expressed intention to resume activity targeted by a challenged law is sufficient to demonstrate a live controversy. Additionally, Lindsay withdrew from classes after the preliminary injunction record was closed and the record on appeal set, and thus these matters have to date been conveyed to this Court via representations of counsel. Plaintiffs have filed a motion to supplement the record on appeal with a declaration of Lindsay Hecox on these matters.

As to the second issue, because Lindsay has standing, the Court "need not decide" whether Jane (Kayden) also has standing. *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012) (quoting *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993)). Moreover, the Court may not need to reach the issue of Kayden's standing because Kayden's claim for declaratory and injunctive relief will soon be moot due to her impending graduation from high school and plans to attend college outside of Idaho.

Should the Court nonetheless address the issue, Kayden has standing for two reasons: first, because she belongs to a class of individuals—women and girls—who are subject to unequal treatment under H.B. 500, which threatens only women and girls and not men and boys with having to prove their sex in response to a dispute; and second, because she faces a non-speculative risk of having her sex disputed given that she does not conform to stereotypes typically associated with women and girls.

## I. LINDSAY HECOX'S CLAIM IS NOT MOOT.

Lindsay Hecox "has a concrete stake in the outcome of this case," which is all that is required to defeat mootness. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288

(2000). Lindsay's temporary leave of absence from BSU is just that—temporary. She has a clear and definite intention to return to BSU next year and to again try out for the women's cross-country and track teams. *See* Plaintiffs-Appellees' Answering Brief, Dkt. 65, at 17 n.4; Mot. to Suppl., Ex. 1 (Suppl. Decl. of Lindsay Hecox) ¶¶ 16–17.[2]

In fall 2020, Lindsay realized that she was struggling with the online learning environment necessitated by COVID-19 and the demands of balancing her schoolwork and her part-time job. *See* Suppl. Hecox Decl. ¶¶ 6–7, 10–13. In consultation with BSU's financial aid department, Lindsay decided in late October 2020 to take a temporary leave of absence from BSU by withdrawing from classes and to work full-time in Idaho for one year so that she could establish in-state residency and thus pay lower tuition. *Id.* ¶¶ 13–14. Since then, Lindsay has consistently expressed her definitive intention to return to BSU and again try out for BSU's women's teams, as

[2] Plaintiffs-Appellees have filed a motion to supplement the record on appeal with a supplemental declaration from Lindsay Hecox that addresses her clear and definite plans to return to BSU and try out for the women's cross-country and track teams. This information is not currently in the record on appeal because Lindsay took her temporary leave of absence by withdrawing from classes after the District Court issued its decision granting the preliminary injunction and the notices of appeal were filed, and therefore after the record on the preliminary injunction motion had been closed. *Compare* Dkt. 2 (stating consolidated appeals were filed on September 16, 2020) *with* Suppl. Hecox Decl. ¶ 13 (explaining Lindsay withdrew from her classes in late October 2020). There is a well-established exception to the general rule against supplementing the record on appeal for evidence that assists the Court in determining its jurisdiction. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1020 n.3 (9th Cir. 2010) (permitting supplementation of the record on appeal so that the Court could determine its jurisdiction); *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (permitting supplementation of the record on appeal where "developments [might] render a controversy moot and thus divest [the Court] of jurisdiction").

reflected in counsel's representation to this Court in Plaintiffs-Appellees' answering brief and at oral argument, as well as in the attached declaration. *See* Answering Brief at 17 n.4; Oral Arg. 25:50-26:02; Suppl. Hecox Decl. ¶ 16. Lindsay has also taken concrete actions in furtherance of these goals. She began working full-time in Idaho in December 2020 and will fulfil Idaho's residency requirements in December 2021, in time to re-enroll at BSU in January 2022 at the in-state tuition rate. Suppl. Hecox Decl. ¶¶ 14, 16. Lindsay continues to train for her pending tryout, and is currently scheduled to race a half marathon. *Id.* ¶ 17. She remains eligible to compete under NCAA rules. *Id.*; *see also* Answering Brief at 17 n.4.[3]

Lindsay's expressed intention to return to BSU and try out for the women's teams, confirmed by the actions detailed above and in the attached declaration, makes clear that her claims are not moot. As shown through the cases discussed below, the Supreme Court and this Court have held repeatedly that an intent to resume activity implicating a challenged law is enough to establish a live controversy.

For example, in *City of Erie v. Pap's A.M.*, a strip club challenging a city ordinance banning public nudity had closed by the time the case reached the Supreme Court. 529 U.S. at 287. Nonetheless, the Court held that "[s]imply closing" the

[3] The State cites NCAA academic eligibility requirements for Division I athletes, *see* State Letter Br. (Dkt. 134-1) at 8, but there is no evidence before this Court showing how those requirements will apply to Lindsay—who completed a full freshman year before temporarily withdrawing—upon her return to BSU. Such speculation does not meet the high bar for showing mootness.

business was "not sufficient to render [the] case moot" because the plaintiff "could again decide to operate a nude dancing establishment in Erie." *Id.* So long as the plaintiff "ha[d] an interest in resuming operations," the Court explained, it "ha[d] an interest in preserving the judgment" below and "a concrete stake in the outcome of [the] case." *Id.* at 288.

Similarly, in *Clark v. City of Lakewood*, this Court considered a situation where a business owner's license to operate had expired after the district court issued its decision. 259 F.3d 996, 1011 (9th Cir. 2001). Even though the owner had not sought to renew the license, his "stated intention [was] to return to business." *Id.* at 1012. Given that stated intent, this Court held that the case was not moot. *Id.*; *see also id.* at 1012 n.9 (explaining that the owner's "stated intention to return to business if the Ordinance is declared unconstitutional" meant that the case was not moot); *Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1001 (9th Cir. 2004) (holding that an overbreadth challenge to a business license requirement that did not presently apply to the plaintiff was not moot "[g]iven the county's expressed intention to amend the ordinance so as to have it apply to [the plaintiff]").

Likewise, in *Southern Oregon Barter Fair v. Jackson County*, this Court considered a nonprofit community fair's First Amendment challenge to a county's permitting procedures. 372 F.3d 1128, 1134 (9th Cir. 2004). The county argued that the case was moot because, although the challenge had been spurred by a specific encounter between the county and the fair, the fair had not applied for another permit

or undertaken any preparations for another fair since. *Id.* This Court explained that the case would be moot "if the Fair had entirely ceased to operate, left the business, and no longer sought or intended to seek a license." *Id.* But that was not the case; the fair's "stated intention [was] to return to business," and the fair had taken steps in that direction, including trying to raise funds and looking for an appropriate venue. *Id.* (quoting *Clark*, 259 F.3d at 1012 n.9).

Lindsay's case is not moot for the same reasons the Supreme Court and this Court held the above cases were not moot. She plans to return to BSU and to try out for the women's cross-country and track teams, which H.B. 500 would prohibit if the District Court's preliminary injunction is lifted or the case is otherwise deemed moot. Indeed, by taking concrete actions in furtherance of her plans, Lindsay has done *more* than the plaintiffs in *Erie* and *Lakewood*, who had taken no actions demonstrating their intentions to restart their businesses and yet were deemed to still have live controversies. *Cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) (finding mootness where lone plaintiff left employment with no intention to return).[4]

As these cases demonstrate, dismissing a case or claim based on mootness requires an extremely high showing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000) (explaining that the burden to show

[4] The State's mootness cases are inapposite. *See* State Letter Br. at 4-5. They involve students who graduated or were soon to graduate and thus ineligible to participate in the challenged school activity, or students who permanently dropped out.

mootness is "heavy") (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Specifically, dismissing part or all of an action as moot is justified only "when it is '*absolutely clear* that the litigant no longer had any need of the judicial protection that it sought.'" *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam)) (emphasis added); *see also Laidlaw*, 528 U.S. at 193 (same). "It is no small matter to deprive a litigant of the rewards of its efforts," and the Court should not do so where—as here—it is not "absolutely clear" that Lindsay will never be subject to H.B. 500. *United States v. Larson*, 302 F.3d 1016, 1020 (9th Cir. 2002) (quoting *Adarand*, 528 U.S. at 224); *see also Camreta v. Greene*, 563 U.S. 692, 703 (2011) ("[I]f the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding."). This is especially true given, as set forth above, that Lindsay has a clear and definite intention to return to BSU and try out for the women's teams.

## II. KAYDEN HULQUIST (JANE DOE) HAS STANDING, BUT THE COURT NEED NOT REACH THAT ISSUE.

Kayden Hulquist has standing, but the Court need not decide that issue. "The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of others." *Melendres*, 695 F.3d at 999. There is no question that Lindsay has standing to challenge H.B. 500. Determining Kayden's standing is thus unnecessary. *See id*.

Moreover, the Court may not need to decide whether Kayden has standing to support the preliminary injunction because Kayden's claim for declaratory and injunctive relief (the only forms of relief sought at the preliminary injunction stage) will soon be moot. As reflected in the record, Kayden is currently a high school senior. *See* 5-ER-688 ¶ 2. Her participation on her high school's soccer and track teams has ended and she will graduate on May 27, 2021. She has now determined that she will be attending college outside of Idaho and accordingly does not expect to be subject to H.B. 500 in the future. This Court has been clear that, "[g]enerally, once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy, and his case is therefore moot." *Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2007); *see also Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000) (same).

Should the Court nonetheless decide to reach the issue of Kayden's standing (as her claim is not moot as of the time of this filing), Kayden has standing to challenge H.B. 500's discriminatory sex-verification dispute provision for two reasons (each of which also applies to Lindsay). *See* Answering Brief at 62–65.

First, H.B. 500 imposes disparate and less favorable treatment on women and girls as compared to men and boys based on sex. Under H.B. 500, only women and girls are subject to the sex-verification dispute provision. Thus, only women and girls are at risk of having their sex challenged and of having to prove their sex pursuant to the dispute provision. Men and boys are not subject to the sex-verification dispute

provision, and so do not suffer this threat and the attendant psychological harm every time they step onto the field. Nor will men and boys ever have to suffer the privacy invasion, embarrassment, and potentially invasive and expensive medical exam of having to prove their sex. "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier." *Ne. Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). In other words, simply being treated differently than boys—who show up to try-outs, practices, and games secure that their sex will never be challenged under the law—because she is a girl is itself enough to confer standing on Kayden. *See* 1-ER-42-43; *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (holding that plaintiff claimed judicially cognizable injury where state subjected him to unequal treatment because of his sex); *Harrison v. Kernan*, 971 F.3d 1069, 1074 (9th Cir. 2020) (holding that a male prisoner had "standing to challenge the existence of separate property schedules for male and female prisoners even if he had not tried to place an order for any specific item of property listed only on the property schedule for females" because "being denied 'equal treatment under law' . . . is 'a judicially cognizable interest that satisfies the case or controversy requirement of Article III,' . . . even if that equal treatment would 'bring[] no tangible benefit to the party asserting it'") (quoting *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015)).[5]

[5] Lindsay has standing for the same reason—she is a woman who is subject to disparate treatment under H.B. 500 as compared to men.

Second, Kayden has standing because she faces a credible threat of being subject to H.B. 500's sex dispute process, beyond that faced by all women and girl athletes in Idaho, given the multiple ways she does not conform to stereotypes related to her sex.[6] *See* 1-ER-43-44. The undisputed record evidence is that "others have jokingly referred to [Kayden] as a boy," she "doesn't often wear skirts or dresses," "most of her friends are boys," she has "an athletic, masculine build," and "people sometimes think of her as masculine." 5-ER-689 ¶ 13; 5-ER-694 ¶¶ 10–12. Defendants made no showing that these are experiences that most girls have—and they are not. Both Kayden and her mother voiced concern that Kayden's sex would be disputed because of these attributes, 5-ER-689 ¶ 13; 5-ER-694 ¶ 13, which is enough to confer standing, *see Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010).

## CONCLUSION

For the foregoing reasons, Lindsay Hecox's claim is not moot, and Kayden Hulquist (Jane Doe) has standing but the Court need not reach that issue**.**

Respectfully submitted,

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[6] Lindsay has standing for a similar reason—she faces a credible threat of being subject to H.B. 500 because she is known to be a woman who is transgender.

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## CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

*/s/ Kathleen Hartnett*
*Counsel for Plaintiffs-Appellees*
May 20, 2021

## CERTIFICATE OF COMPLIANCE

I hereby certify as follows: This letter brief complies with the length limit permitted by Court in its May 6, 2021 Order. The brief's type size and typeface comply with Fed. R. App. 32(a)(5) and (6) because the brief has been prepared in 14-point Times New Roman.

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May 20, 2021