



May 20, 2021

VIA EM/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, et al. v. Little, et al.* – Appeal Nos. 20-35813 and 20-35815

Dear Ms. Dwyer,

This letter responds to the Court’s order asking the parties to brief two questions: (1) Is Lindsay Hecox’s claim moot because Hecox is not enrolled at Boise State University? (2) Does Jane Doe have standing based on her asserted fear of having her sex disputed? Hecox’s claim is, in fact, moot, and Doe lacks standing.

A. Hecox’s claims are moot because Hecox withdrew from all classes mere days after failing to make the women’s track team and has not reenrolled.

1. Article III requires that “an actual, ongoing controversy exist” throughout litigation. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017). “It is not enough that a controversy existed at the time the complaint was filed.” *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). At every stage, a plaintiff must establish an “actual controversy,” not just an “abstract dispute . . . solely about the meaning of a law.” *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). If that grievance “evaporate[s] or disappear[s],” the claims are moot. *Bayer*, 861 F.3d at 867.¹

¹ The Supreme Court has described mootness as “the doctrine of standing set in a time frame.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997).

Molly C. Dwyer

May 20, 2021

Page 2

2. Plaintiffs have represented that Hecox took a “leave of absence from BSU to work full time, establish her Idaho residency, and save money for school.” Appellees’ Br. 17 n.4. But Hecox never requested a “leave of absence” from BSU. Instead, within six days after failing to make the BSU women’s track team in October 2020, Hecox simply withdrew from all enrolled classes. Brewer Decl. 1–2; Nelson Decl. 1–2.² “A ‘leave of absence’ is not a term or phrase that is used by BSU’s Registrar’s Office in relation to students who self-withdraw from classes prior to the deadline for dropping classes.” Nelson Decl. 2. And Hecox did not enroll in any classes at BSU for the 2021 spring semester and has not enrolled in any classes for the 2021 fall semester either—even though registration for the fall semester opened on March 22, 2021. *Id.* Since Hecox’s “complete withdrawal from classes” in October 2020, Hecox has not been a student enrolled at BSU.

3. That “change[] in . . . circumstances” has “forestalled any occasion for meaningful relief” and mooted Hecox’s complaint. *Bayer*, 861 F.3d at 867. The Fairness in Women’s Sports Act applies only to “students.” IDAHO CODE ANN. § 33-6203(2) (“Athletic teams or sports designated for females, women, or girls shall not be open to *students* of the male sex.” (emphasis added)). And Hecox is no longer a student. The Act therefore does not apply to Hecox, so a dispute about its constitutionality is purely abstract. *Arizonans for Official English v. Arizona*, 520

² In a separate motion, Intervenors have moved to supplement the record to allow the Court to consider these declarations to decide the Court’s jurisdiction.

Molly C. Dwyer
May 20, 2021
Page 3

U.S. 43, 67 (1997) (state employee’s challenge to state law governing work conditions for state employees was mooted when the employee resigned to “take up employment in the private sector,” putting her beyond the law’s scope).

4. Any claim the Act *may* apply to Hecox sometime in the future requires speculation about numerous uncertain future events, including Hecox’s re-enrollment and ability to qualify for and pay in-state tuition. And “speculative contingencies afford no basis for . . . passing on the substantive issues.” *Hall v. Beals*, 396 U.S. 45, 49 (1969) (per curiam).

5. First, Hecox has not established a “likelihood” of reenrolling in classes. *Monahan v. Nebraska*, 687 F.2d 1164, 1168 (8th Cir. 1982) (claim moot where student had “voluntarily ceased attending classes” and, though student “stated that she plan[ned] to move back . . . and continue her education, [the court was] not told when [that would] occur”). Though Hecox states an *intention* to re-enroll in January 2022, a student’s “bare statement of intention [to reenroll] is insufficient to escape mootness.” *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 143 (2d Cir. 1994). Article III jurisdiction cannot be based on “contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted).

6. Like the students in *Monahan* and *Fox*, Hecox offers nothing more than “contingent future events.” *Id.* Hecox does not claim to be “*currently seeking*” reenrollment. *Bayer*, 861 F.3d at 865 (emphasis added). In fact, although BSU

Molly C. Dwyer
May 20, 2021
Page 4

opened enrollment for the fall semester on March 22, 2021, Hecox had taken no step to reenroll by the time of this briefing and states only an intent to re-enroll in January 2022. Nelson Decl. 2; Hecox Decl. 3. At best, Hecox's asserted intentions establish a hypothetical possibility, not a "reasonably certain basis for concluding [that Hecox] has some personal need for prospective relief." *Bayer*, 861 F.3d at 865; *Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1214 (9th Cir. 2018) ("The assertion that [the plaintiff] could *conceivably* return to her old job, without more, is precisely the type of speculative 'some day' intention the Supreme Court has rejected as insufficient to confer standing." (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992))). Hecox's "hypothetical intent" is not enough to make this case justiciable. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc).

7. The facts and analysis in *Fox* are parallel and instructive. There, students at a New York university challenged a school regulation that prevented them from hosting a cookware demonstration in their dorm rooms. Most of the students had graduated by the time the case reached the Second Circuit, mooting their claims. But one student who had "left the [school] system lacking two credits for graduation" argued that the case was *not* moot because he still "intend[ed] to complete his studies at [the school]." *Fox*, 42 F.3d at 143. Despite that assertion, the Second Circuit held that the "bare statement of intention [was] insufficient to escape mootness." *Id.* So too here.

Molly C. Dwyer

May 20, 2021

Page 5

8. Second, Plaintiffs’ representation about the reason Hecox withdrew from BSU in the first place—and the reason Hecox will not be able to re-enroll until January 2022 at the earliest—presents its own independent “speculative contingenc[y].” *Foster v. Carson*, 347 F.3d 742, 748 (9th Cir. 2003). Hecox withdrew to “work full time” to “save money for school.” Appellees’ Br. 17 n.4. The necessary costs of attending BSU—not only of tuition, but also the expenses of rent and food—are substantial.³ And it remains doubtful that Hecox will be able to save up enough funds to return to BSU even by January 2022. Moreover, because Hecox is not an in-state resident, Hecox must “live in Idaho for twelve consecutive months for purposes other than education,” Hecox Decl., while maintaining “permanent full-time employment” during that time to qualify for lower tuition, *see Idaho Residency*, BOISE STATE UNIV., <https://perma.cc/K7YD-84GU>. Any disruption to a continuous twelve-month residency or permanent full-time employment would restart the clock and subject Hecox to the same out-of-state tuition that once before proved unaffordable. Whatever Hecox’s intentions may be, Hecox’s confessed need to “save money for school” highlights another “chain of speculative contingencies” making Hecox’s case moot. *Nelsen v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990); *Grandson v. Univ. of Minn.*, 272 F.3d 568, 574 (8th Cir. 2001) (case moot because student left school for financial reasons and alleged only that she “may return”).

³ *See Cost of Attendance*, BOISE STATE UNIV., <https://perma.cc/XBN3-6FVM>.

Molly C. Dwyer
May 20, 2021
Page 6

9. Finally, when Hecox was allowed to try out for the women's track team as a result of the injunction entered below, Hecox "did not make the team." Appellees' Br. 17 n.4. This fact highlights one more reason why it is speculative that Hecox will or could ever suffer any injury that is "fairly traceable" to the Act. *Lujan*, 504 U.S. at 560 (cleaned up). Up to the present, Hecox's lack of ability as a runner, rather than the Act, has excluded Hecox from participating on the BSU women's teams. While Plaintiffs represent that Hecox "continues to train," Appellees' Br. 17 n.4, there is no basis beyond speculation to expect that Hecox's ability to make the team will improve.

10. In sum, the facts that Hecox (1) withdrew from all registration at BSU immediately upon failing to make the women's team, (2) is not an Idaho resident and has yet to qualify for in-state tuition, (3) lacks the financial ability to pay for tuition, room, and board, and (4) has been unable to qualify for the BSU women's teams, each raise an independent barrier to this Court's exercise of jurisdiction.

11. At oral argument, counsel for Plaintiffs cited *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). There, a "nude dancing establishment" challenged a city ordinance banning public nudity. *Id.* at 282. Although the establishment had closed by the time its case reached the Supreme Court, the Court nonetheless held that the case was not moot. *Id.* at 289. But *City of Erie* is not analogous.⁴

⁴ The other cases cited in Hecox's letter brief are similarly inapposite. Hecox's Letter Br. 5–6. They all arose in the First Amendment context, where unique

Molly C. Dwyer

May 20, 2021

Page 7

12. In *City of Erie*, the “dancing establishment” initially prevailed, winning an injunction in state court. Then, after the Supreme Court granted certiorari, the establishment argued for the first time that the case was moot because it had stopped operating. The Supreme Court suspected the establishment was trying to game the process to keep the injunction in place, noting that the Court’s appraisal of the establishment’s affidavit averring mootness was influenced by the establishment’s failure to mention its closure in its opposition to the petition for writ of certiorari “despite its obligation to the Court.” *Id.* at 288. Instead, the establishment had raised the purported mootness only “after [the] Court [had] granted certiorari,” so the Court concluded that its “interest in preventing litigants from attempting to manipulate the Court’s jurisdiction to insulate a favorable decision from review . . . counsel[ed] against a finding of mootness.” *Id.*

13. Even with this unusual prudential consideration in play, the Court in *Erie* considered the question of mootness to be a “close” one. *Id.* at 289. No such consideration exists in the present case. Where, as here, “mootness results from the unilateral action of the party who prevailed in the lower court,” the proper course is to vacate the judgment below and remand with instructions to dismiss. *U.S.*

Bancorp Mortg. Co. v. Bonner Mall P’ship, 513 U.S. 18, 23 (1994); *United States v.*

concerns about chilling militate against mootness. Hecox cites no other case outside the First Amendment context, and this case involves no First Amendment issues. The cases cited by Appellant and Intervenors—cases like *Fox*—accurately describe the pertinent law.

Molly C. Dwyer

May 20, 2021

Page 8

Munsingwear, Inc., 340 U.S. 36, 40–41 (1950). This court should therefore vacate the judgment below and remand with instructions to dismiss the case as moot.⁵

B. Jane Doe’s allegations are speculative and insufficiently concrete to give her standing to challenge the Fairness in Women’s Sports Act.

14. Intervenors have previously briefed Jane Doe’s lack of standing in some detail. Intervenors’ Opening Br. 45–50; Intervenors’ Reply Br. 26–27. So they respectfully refer the Court to those discussions and only briefly summarize key points here. Moreover, as Appellees concede, Doe’s claims will be moot within a few days after the filing of this brief. Appellees’ Letter Br. 8; Appellant’s Letter Br. 10.

15. Under Article III, Doe must show that the Fairness in Women’s Sports Act injures her in a way both “real and immediate.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002). She has not carried that burden. In her complaint, she alleges only that because she “has an athletic build” and “does not commonly wear skirts or dresses,” “people sometimes think of her as masculine.” ER773. She “worries that people might use that as an excuse to ‘dispute’ her gender.” *Id.* And she “worries” that a competitor “might decide to ‘dispute’ her sex just to try to keep her from playing.” ER772–73.

⁵ Because *City of Erie* was before the Supreme Court on writ of certiorari to a state supreme court, the federal Supreme Court lacked jurisdiction to remand with instructions to vacate the judgment and injunction below. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 305 (2000) (Scalia, J., concurring in the judgment). No such structural impediment exists here, and an order of vacatur in light of the present mootness is the correct way to resolve this case.

Molly C. Dwyer

May 20, 2021

Page 9

16. These same “worries” could be asserted by thousands of athletic high school and college girls and women who live in Idaho. And Doe does not even assert that anyone has ever actually mistaken her for a boy. Nor does she allege that anyone has ever threatened to dispute her gender. Without such concrete details, Doe asserts nothing more than a “generalized claim that the statute’s very existence has an inhibiting effect on her.” *Del Percio v. Thornsley*, 877 F.2d 785, 787 (9th Cir. 1989). But “[t]he mere existence of a statute, which may or may not ever be applied to [Doe], is not sufficient to create a case or controversy within the meaning of Article III.” *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (citation omitted); accord, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (“It is not sufficient for Al-Haramain to speculate that it *might* be subject to surveillance under the TSP simply because it has been designated a ‘Specially Designated Global Terrorist.’” (emphasis added)). Doe has thus failed to show that she has standing.

17. Doe’s feared injury is equally speculative. Doe alleges that the Act would require her “to go through an invasive or uncomfortable test.” ER773. But the Act does not require any such test. Under the Act, Doe’s health-care provider “*may* verify” her “biological sex as part of a routine sports physical examination relying only on one (1) or more” of three factors. IDAHO CODE ANN. § 33-6203(3) (emphasis added). But the Act also allows schools to request “a health examination and consent form or other statement signed by the student’s personal health care

Molly C. Dwyer

May 20, 2021

Page 10

provider” to verify “the student’s biological sex.” *Id.* And the responsible school officials have all explained they interpret the Act to allow a student like Doe to verify her biological sex *without* undergoing “an exam relying on one of [the three] factors.” ER158–59. Doe’s misunderstanding of the Act does not “create a case or controversy” under Article III. *San Diego Cnty.*, 98 F.3d at 1126.

18. The district court concluded otherwise based entirely on speculation. The court stated that Doe “*may* have to verify that she is female,” that she is “more *likely* than other female athletes to be subjected to the dispute process,” and that the process could “*potentially*” involve certain harms. ER41, ER44–45 (emphasis added). “The court’s use of conditional language is a tacit acknowledgement that the injury alleged here is far too speculative to satisfy the injury-in-fact requirement of Article III standing.” *Scott*, 306 F.3d at 658. Doe has not “adequately averred that any specific action is threatened or even contemplated against [her].” *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.). The district court therefore erred in relying on the “hypothetical existence of a . . . gender barrier” to conclude that Doe has standing. *Scott*, 306 F.3d at 657.

Respectfully Submitted,

s/ Roger G. Brooks

Roger G. Brooks

Counsel for Intervenors-Appellants

cc: Counsel of Record via CM/ECF

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

This brief contains words, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties;
 - a party or parties are filing a single brief in response to multiple briefs; or
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated .
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov