APPEAL NOS. 20-35813, 20-35815

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY HECOX and JANE DOE, with her next friends Jean Doe and John Doe,

Plaintiffs-Appellees,

v.

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellants,

and

MADISON KENYON and MARY MARSHALL,

Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
Case No. 1:20-cv-00184-DCN
Hon. David C. Nye

INTERVENORS-APPELLANTS' MOTION FOR SUPPLEMENTAL BRIEFING

KRISTEN K. WAGGONER
JOHN J. BURSCH
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
ckiefer@ADFlegal.org

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rbrooks@ADFlegal.org

BRUCE D. SKAUG
RAUL R. LABRADOR
SKAUG LAW. P.C.
1226 E. Karcher Road
Nampa, ID 83687
(208) 466-0030
bruce@skauglaw.com
raul@skauglaw.com

CHRISTOPHER P. SCHANDEVEL
CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
cschandevel@ADFlegal.org
cbarnett@ADFlegal.org

Counsel for Intervenors-Appellants

Under this Court's inherent equitable powers, Intervenors Madison Kenyon and Mary Marshall respectfully move for a supplemental briefing schedule so that all the parties have an opportunity to address the district court's mootness determination.

In June 2021, this Court remanded the case to the district court for "the limited purpose of determining whether Lindsay Hecox's claim *is* moot in light of [Hecox's] changed enrollment status at Boise State University." Order at 2 (emphasis added). This Court specifically asked the district court to assess current "information regarding the BSU re-enrollment process, the steps Hecox *has taken* toward re-enrollment, and the availability of BSU women's sports outside of NCAA teams," and then to "apply the required caution and care to the *initial* mootness determination." Order at 4 (emphasis added). On remand, the parties submitted jointly stipulated facts for the district court's consideration in October 2021. Hecox submitted additional new facts in December 2021. And then in March 2022, the district court informed the parties that it had been "unable to immediately address the parties' submissions," Docket Entry Order at 1, ECF No. 101, so the court ordered the parties to submit *another* round of stipulated facts—facts that arose well after "the initial mootness determination," Order at 4.

That was error. "When a case has become moot while in the district court," courts should "not supplement the record with subsequent facts proffered in an effort to demonstrate the case is not moot." *Robertson v.*

Biby, 719 F. App'x 802, 804 (10th Cir. 2017) (citing *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 n.11 (10th Cir. 2010)). By doing so, the district court allowed Hecox to "breathe new life into . . . claims *after* they became moot." *Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 326 (4th Cir. 2021) (emphasis added). The district court should have resolved this case exactly as this Court instructed: determining solely whether the case had become moot by the time of the panel's remand order "in light of [Hecox's] changed enrollment status at Boise State University." Order at 2. Nothing in Hecox's December 2021 submission or in the March 2022 stipulated facts could or should have been relevant to that analysis.

The district court also inappropriately saddled Defendants with producing evidence to show mootness. Though Defendants have the burden of *persuasion* on mootness, Defendants logically cannot bear the burden of *production* to show that a party "will *not* take certain action," as the district court required.[1] Order on Mootness Issue at 17, ECF No.

[1] To the extent that the district court relied on authorities from this Court for the contrary proposition, those cases conflict with other circuit precedent. *Compare Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1174 (9th Cir. 2009) ("[W]hen there is an argument about whether a plaintiff will again encounter a challenged activity, this court has required little more than what Rosemere has already supplied: a stated intention to resume the actions that led to the litigation."), *with Gemtel Corp. v. Redevelopment Agency of L.A.*, 23 F.3d 1542, 1545 (9th Cir. 1994) ("[Plaintiff] had the burden of demonstrating jurisdiction, in the face of the apparent mootness of the claim, and put forward no evidence of any

105. That's why courts historically ask plaintiffs—not defendants—to show more than a "bare statement of intention." *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 143 (2d Cir. 1994). Only Hecox could produce facts that show more than a bare assertion, so only Hecox should have borne the burden of production. And Hecox failed to produce sufficient evidence in the initial stipulations to show that the case had not become moot.

Given these errors, Intervenors respectfully move this Court to issue a supplemental briefing order so that the parties have an opportunity to brief for this Court whether the district court correctly determined the mootness issue.[2]

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reasonable likelihood that the hotel would be built."). Supplemental briefing on this issue will therefore help this Court determine whether en banc review is "necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1).

[2] Per Circuit Rule 27-1, Intervenors contacted opposing counsel to ascertain their position on a supplemental briefing schedule, but opposing counsel did not respond. Defendants-Appellants do not oppose this motion.

Respectfully submitted,

Madison Kenyon and
Mary Marshall,
Intervenors-Appellants

Dated: August 3, 2022

By: */s/ Roger G. Brooks*

KRISTEN K. WAGGONER
JOHN J. BURSCH
CHRISTIANA M. HOLCOMB
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org
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raul@skauglaw.com

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15100 N. 90th Street
Scottsdale, AZ 85260
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CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
cschandevel@ADFlegal.org
cbarnett@ADFlegal.org

Counsel for Intervenors-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2022, I electronically filed the foregoing motion for supplemental briefing 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/ Roger G. Brooks
Roger G. Brooks
Counsel for Intervenors-Appellants

August 3, 2022