

Appeal Nos. 20-35813, 20-35815

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LINDSAY HECOX and JANE DOE, with her  
next friends Jean Doe and John Doe,  
*Plaintiffs-Appellees,*

v.

BRADLEY LITTLE, *et al.*,  
*Defendants-Appellants,*

and

MADISON KENYON and MARY MARSHALL,  
*Intervenors-Appellants.*

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

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**PLAINTIFFS-APPELLEES LINDSAY HECOX AND JANE DOE'S OPPOSITION  
TO INTERVENORS-APPELLANTS' MOTION FOR SUPPLEMENTAL  
BRIEFING**

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On June 24, 2021, this Court remanded this appeal to the district court “for the limited purpose of determining whether Lindsay Hecox’s claim is moot in light of her changed enrollment status at Boise State University (BSU).” Dkt. 143 (“Remand Order”) at 1.<sup>1</sup> This Court charged the district court with determining “[w]hether an actual case or controversy remains” in light of the fact that “Hecox is not currently enrolled at BSU, but declared she plans to re-enroll in January 2022, after achieving in-state residency.” *Id.* This Court listed several questions it thought would aid in determining whether Lindsay’s claim is moot, and concluded that it was “remand[ing] so that the district court *can develop the record, resolve any factual disputes,* and apply the required caution and care to the initial mootness determination.” Remand Order at 3–4 (emphasis added); *see* Dkt. 149, Ex. A (“Order on Mootness,” issued by the district court on July 18, 2022) at 4.

The district court did just that. As set forth in great detail in the district court’s Order on Mootness, the district court “develop[ed] the record,” Remand Order at 4, by “establish[ing] a plan and schedule for

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<sup>1</sup> Unless otherwise noted, citations to “Dkt.” are to the Ninth Circuit’s docket.

the remand proceedings,” Order on Mootness at 5. This plan included informal information exchange between the parties to prepare stipulated facts regarding, *inter alia*: Lindsay’s enrollment status at BSU; Lindsay’s academic status at BSU; NCAA rules and policies governing Lindsay’s eligibility to participate in BSU intercollegiate athletics (*i.e.*, women’s cross country and track); options for Lindsay to play on a BSU club team (as opposed to NCAA team); and other questions raised by this Court in its Remand Order. Order on Mootness at 5. Then, in March 2022, the district court asked the parties to supplement the stipulated facts with any pertinent updates, including with respect to Lindsay’s enrollment at BSU and her future athletic plans. *Id.* This was all designed to permit the district court to “resolve any factual disputes” as ordered by this Court. Remand Order at 4.

On July 18, 2022, after having reviewed the parties’ supplemental filings and briefing, *see* Dist. Ct. Dkt. 92, 102, the district court issued factual findings as contemplated by the Remand Order and held that Lindsay’s claim is not moot. Order on Mootness at 2, 6–12. The district court systematically addressed each of the questions raised by this Court, relied on the facts provided by the parties, reviewed briefing and the

pertinent legal standards, and concluded that “Hecox’s claim is not moot.” *Id.* at 25.

Now, unhappy with the district court’s correct determination that Lindsay’s claim is not moot, Intervenors-Appellants assert, for the first time and after making no such objection below, that the district court improperly considered “subsequent facts” in making its determination that Lindsay’s claim is not moot. Dkt. 152 at 1–2 (citations omitted). Specifically, Intervenors-Appellants attempt to fault the district court for considering facts that were presented to the district court in December 2021 and, upon the district court’s request, in April 2022. This argument should be rejected out of hand. As an initial matter, the facts presented in December 2021 and April 2022 were all responsive to the questions raised in this Court’s Remand Order. This Court ordered the district court to “develop the record” and “resolve any factual disputes” to determine whether Lindsay’s claim is moot. Remand Order at 4. The crux of the issue revolved around Lindsay’s “plans to re-enroll ... after achieving in-state residency.” *Id.* at 2. Indeed, this Court stated that “it is essential to know whether Hecox would be eligible to play for BSU if she re-enrolled and made the team.” *Id.* at 3. The district court was thus

required to review supplemental facts to respond to the several questions raised in the Remand Order. That the district court developed the factual record in order to respond fully and accurately to the questions posed by this Court is precisely what the Remand Order required the district court to do, not error.

Furthermore, Intervenors-Appellants never once objected below to the December 2021 or April 2022 submissions of facts, despite having ample opportunity to do so. Indeed, the April 2022 submission of facts was a *joint* stipulation that required all parties—including Intervenors-Appellees—to sign on. Dist. Ct. Dkt. 102 (Ex. A, “Supplemental Stipulated Facts on March 16, 2022 Order”). Because Intervenors-Appellants failed to raise their objections before the district court, they cannot raise them now. *See, e.g., Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006) (recognizing general rule that issues not raised before the district court are waived).

The cases cited by Intervenors-Appellants provide no basis to disturb the district court’s carefully considered process and determination. For example, Intervenors-Appellants cite an unpublished Tenth Circuit case to argue that the district court cannot “supplement

the record with subsequent facts proffered in an effort to demonstrate the case is not moot.” Dkt. 152 at 1 (quoting *Robertson v. Biby*, 719 F. App’x 802, 804 (10th Cir. 2017)). But *Biby* is inapposite. In *Biby*, the parties were forbidden from supplementing the record in order to create “a *different dispute* from the one that was before the district court.” 719 F. App’x at 804 (emphasis added). Moreover, this case was never moot—not in the district court in the first instance, not pending this Court’s consideration of the appeal, and not during the course of the limited remand. To the contrary, at every stage, Lindsay has had “a concrete stake in the outcome of this case.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288 (2000); *see, e.g.*, Plaintiffs’ Opening Brief in Response to June 24, 2021 Order, Dist. Ct. Dkt. 97 (describing lack of mootness as of November 2021).

Similarly, in the other case cited by Intervenor-Appellants, *Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, the plaintiff was prohibited from supplementing the record where she was attempting to bring an entirely new claim. 14 F.4th 322, 326 (4th Cir. 2021) (refusing to recognize new claim where “her original claims are now moot”). By contrast, the facts requested by this Court and provided to

the district court on remand all pertain to the same question raised in the Complaint and on appeal: whether Lindsay can challenge H.B. 500, a law that categorically bars transgender girls and women like her from playing on women's sports teams. For the avoidance of any doubt, Lindsay is not raising a different dispute and she has no interest in anything other than affirmance of the district court's preliminary injunction order. *See* Memorandum Decision and Order on Motion to Intervene, Dist. Ct. Dkt. 63.

In sum, the district court was permitted (in fact, ordered) to consider all relevant facts, which included October 2021 stipulated facts, as well as the December 2021 and April 2022 factual submissions, in determining that Lindsay's claim is not moot. Notably, even when taken on their own, the October 2021 stipulated facts suffice to rebut the notion of mootness. As of that time, the district court had before it each and every concrete step that Lindsay took to re-enroll at BSU. Order on Mootness at 15–17 (outlining Lindsay's efforts to establish in-state residency and save money for school tuition). Also true as of October 2021 was that, "but for the [district court's] injunction," Lindsay would be unable to try out for or compete on either the women's cross-country

or track teams or the women’s club soccer team, which she had expressed a desire to join. Order on Mootness at 20–22. That Lindsay eventually “followed through with such plans,” *id.* at 15, by enrolling at BSU and playing on the women’s club soccer team—as demonstrated by the December 2021 and April 2022 submissions—is simply the natural result of her concrete efforts and genuine intentions that were part of the record as of October 2021.<sup>2</sup>

## CONCLUSION

For the foregoing reasons, no further briefing is needed regarding the district court’s Order on Mootness: Intervenor-Appellants’ objections to the district court’s process are waived and meritless, and the district court’s mootness determination is sound. Should the Court determine that additional briefing would be useful in order for it to

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<sup>2</sup> Intervenor-Appellants also complain that the district court improperly shifted the burden of showing mootness onto Defendants, citing *Gemtel Corp. v. Cmty. Redevelopment Agency of City of Los Angeles*, 23 F.3d 1542, 1554–55 (9th Cir. 1994). As the district court acknowledged, however, and as was briefed fully below, *Gemtel* involved voluntary cessation by a defendant and is distinguishable from the facts in this case. *See* Order on Mootness at 13 n.13. Moreover, the district court also observed that, even if Lindsay had the burden of establishing that her claim is not moot, she met this burden here. *Id.*

resolve this appeal, however, Plaintiffs-Appellees are of course happy to provide such briefing.

Dated: August 15, 2022

Respectfully submitted,

/s/ Kathleen Hartnett

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## CERTIFICATE OF SERVICE

I hereby certify that on August 15, 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/ Kathleen Hartnett  
Kathleen Hartnett  
*Counsel for Plaintiffs-Appellees*  
August 15, 2022

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

Lindsay Hecox, et al.,

Plaintiffs,

v.

Bradley Little, et al.,

Defendants.

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

Hon. David C. Nye

**SUPPLEMENTAL STIPULATED  
FACTS IN RESPONSE TO DISTRICT  
COURT ORDER DATED MARCH 16,  
2022**

On March 16, 2022, the Court ordered the parties to file supplemental stipulated facts “updating the Court on the status of Plaintiff Lindsay Hecox’s enrollment at Boise State University (“BSU”), and specifically addressing whether she is still enrolled in nine credits, and attending such classes, at BSU this semester,” as well as “whether: (1) Hecox has joined and is playing for BSU Women’s Club Soccer Team; and (2) she still intends to try out for the BSU Women’s Cross Country Team in the Fall of 2022.” (Dkt. No. 101). In response, the parties stipulate to the following facts:

**Lindsay Hecox’s Enrollment at BSU**

1. Lindsay Hecox is enrolled at BSU.
2. Lindsay Hecox qualified for in-state tuition at BSU.
3. Lindsay Hecox is enrolled in nine credits this Spring 2022 semester.
4. Lindsay Hecox is attending her classes.

**Lindsay Hecox’s Participation in BSU Women’s Club Soccer**

5. Lindsay Hecox joined and is playing for the BSU Women’s Club Soccer team.

**Lindsay Hecox’s Intention to Try Out for the BSU Women’s Cross-Country Team in Fall 2022**

6. Lindsay Hecox says she still intends to try out for the BSU Women’s Cross-Country Team in Fall 2022.

**Change to NCAA Transgender Participation Policy**

7. In paragraph 21 of the Stipulated Facts in Response to Ninth Circuit Order Dated June 24, 2021 (Dkt. No. 92), the parties stated: “NCAA policy requires Lindsay Hecox to complete at least 12 months of testosterone suppression treatment leading up to the Fall 2022 semester to compete on the women’s track and cross country teams.” The parties wish to alert the Court that in January 2022, the NCAA Board of Governors updated the transgender student-athlete participation policy governing college sports. Information about the NCAA’s revised policy is available at <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>.

DATED this 13th day of April, 2022.

By: /s/ Kathleen Hartnett  
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By: /s/ W. Scott Zanzig  
W. SCOTT ZANZIG  
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By: /s/ Roger E. Brooks  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 13, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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